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SOCIAL SECURITY DISABILITY REVIEWS: THE ROLE OF THE ADMINISTRATIVE LAW JUDGE

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

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SOCIAL SECURITY DISABILITY REVIEWS: THE ROLE OF THE ADMINISTRATIVE LAW JUDGE

WEDNESDAY, JUNE 8, 1983

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT OF
GOVERNMENT MANAGEMENT,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C.

The subcommittee met at 9:30 a.m., in room SD–342, Dirksen Senate Office Building, Hon. William S. Cohen (chairman of the subcommittee) presiding.

Present: Senators Cohen and Levin.

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. The Oversight of Government Management Subcommittee is holding this hearing to examine the role of the administrative law judge [ALJ] in the social security disability program. It is a followup to a hearing the subcommittee held last year on the continuing disability investigations. That hearing revealed a seriously flawed review process that has caused thousands of severely disabled individuals to be purged from the disability program, only to be reinstated many months, or even a year later, after a hearing before an administrative law judge. Nearly 90,000 disabled workers have been reinstated on appeal since 1981, when the reviews began.

Administrative law judges play a key role in the disability adjudications, They hear appeals from claimants who have had their disability benefits terminated, as well as from applicants who have had their initial claims denied.

Although the Social Security Administration is starting to implement a personal hearing at the reconsideration stage of the appeals process, for most claimants the ALJ hearing is currently the first face-to-face evidentiary hearing on the disability claim. The ALJ has the dual responsibility of protecting the claimant's right and at the same time of insuring that benefits are not paid to those who fail to meet the requirements of the law.

As the Maine ALJ in charge recently explained to me in a letter:

> The present role of the ALJ is that of a person wearing several hats. In the resolution of Social Security claims, the ALJ must not only insure compliance with the law and regulations, but he also has a duty to the claimant to insure due process, a fair hearing, and that the claimant's medical impairments have been fully evaluated from a medical and legal standpoint. The ALJ has sometimes been compared to the judge of a juvenile court, who must look out for the interest of the juvenile, as well as that of the State.

The ALJ's responsibility to the claimant is particularly significant in cases where the individual is not represented by counsel, as often occurs in disability appeals. In short, the administrative law judge affords the claimant a full and fair hearing and provides a good faith decision that reflects the full deliberation upon the entire record.

The decisions of ALJ's have profound effects on people's lives and, in many cases, represent the difference between a dignified standard of living and abject poverty for a disabled worker. The ALJ's ability to make independent decisions is, therefore, crucial and is guaranteed by the Administrative Procedure Act, which insulates ALJ's from agency pressure. The act vests their selection in the Office of Personnel Management and dictates that they only be removed for good cause established after a hearing before the Merit Systems Protection Board.

As a further safeguard to insure separation of the agency's enforcement from its adjudication staff, the law provides that the ALJ's cannot be supervised by anyone having an investigative or prosecutorial role in the agency.

The number of individuals seeking a hearing before an ALJ has soared in recent years, particularly since the SSA began the disability reviews mandated by Congress. Hearings requests jumped from 155,000 cases in 1975 to 320,000 in 1982 and are projected to exceed 400,000 in 1983. The number of administrative law judges hired has not nearly kept pace with this dramatic increase in appeals. The increased caseload has placed enormous strains on the appeals systems. As of August 1982, the backlog of cases exceeded 150,000, and the average processing time for hearings rose to 164 days.

Since the ALJ's are reversing about 60 percent of the termination decisions that they review, this means that thousands of individuals are needlessly enduring hardships for many months, while waiting for hearings that will ultimately restore them to the program.

To ease this financial hardship. Congress last year approved temporary legislation to allow the continuation of benefits pending appeal.

To deal with the backlog of cases, the Social Security Administration has encouraged ALJ's to increase the number of cases that they handle each month by setting production goals for them. In fiscal 1974, ALJ's, on an average, disposed of 13 cases a month. For fiscal 1983, the SSA has established a production goal of 45 cases a month. The agency has also instituted counseling and retraining for judges with low productivity. The Association of Administrative Law Judges, which represents ALJ's working for the Social Security Administration, has charged that this pressure to produce encourages the payment of unworthy claims, interferes with the judges' independent decisionmaking and, perhaps most serious, denies due process to the claimants. They further allege that Social Security's practice of reviewing decisions of ALJ's with high allowance rates has a chilling effect because the judge targeted for review is always conscious of the agency looking over his shoulder to second-guess his judgments.

These allegations raise troubling questions. In its quest for efficiency, for example, is the SSA shortchanging the claimant's right to a full development of the hearing record? Is the SSA sacrificing the statutory rights of disabled workers to receive benefits, in order to reduce the cost of the disability program? And, even if the agency is not intentionally pressuring ALJ's, does the perception of pressure give reality to the illusion? Whether the SSA's production goals and retraining programs are simply commendable efforts to insure that claimants are given hearings as soon as possible and the ALJ's have a full understanding of the law, or an attempt to pressure ALJ's into deciding fewer cases in favor of the claimants is a matter of great dispute and, I think, far-reaching implications. We are going to hear both arguments presented today.

Another issue of concern to the subcommittee is the SSA's attempt to achieve uniformity in disability determinations by incorporating standards used by the State claims examiners, the so-called POMS into Social Security rulings, which the ALJ's must follow. I think it is clear that we do have to establish uniform standards as an essential component of a rational Social Security disability process. And a cornerstone of the comprehensive reform legislation Senator Levin and I have introduced would require the promulgation of uniform standards for all decisionmakers.

There is one big difference, however. Our bill would require the criteria to be subject to the public notice and comment provisions of the Administrative Procedure Act. By contrast, the SSA's issuance of rulings to bind all adjudicators does not have the benefit of public comment. The subcommittee is going to consider the effect of this SSA activity on all ALJ decisionmaking and on the claimants.

Finally, the subcommittee is going to examine the impact of the SSA's policy of issuing rulings of nonacquiescence when it disagrees with a Federal court decision but chooses not to appeal it. The nonsacquiescence policy places the ALJ in a very difficult position. As an employee of the Social Security Administration, the ALJ is bound by the Commissioner's rulings; however, as an officer of the court, the ALJ should not ignore court decisions. The ALJ's, as the court said in *Hillhouse* v. *Harris,* are in an awkward position. They are trying to serve two masters, the court and the Secretary of Health and Human Services.

I would also suggest that the effect upon the claimants is equally troubling. When the SSA issues a ruling of nonacquiescence, it, in effect, forces an identically situated claimant to go to court in order to obtain a favorable ruling and relief. This renders the administrative proceedings, including the ALJ hearing, pointless, as the disabled individual knows he is going to file a district court action, if the ALJ obeys the SSA and ignores the court ruling.

Even though the Social Security Administration has chosen to nonacquiesce in only eight judicial opinions, these cases have involved significant issues, such as whether the agency should have to show medical improvement or an error in the initial decision before terminating certain beneficiaries, which would significantly alter disability determinations were they followed.

We are going to receive testimony on the constitutionality of nonacquiescence, as well as its impact upon the claimants and the ALJ's.

Our goal this morning is to try and see whether or not we can strengthen the review process to insure that individuals whose social security taxes have been paid for insurance against disabling illness or accidents are treated fairly and humanely. A full and fair hearing and an impartial decisionmaker are fundamental to preserving our citizens' faith in their Government. Any agency actions which compromise the ALJ's independence would not only violate the law but also undermine public confidence in the integrity of the administrative proceedings and jeopardize the rights of disabled workers under the law.

I might point out that both Senator Levin and I were somewhat disappointed in yesterday's announcement by the Administration, on several counts. No. 1, we had requested that members of our staffs might be present to attend the press conference in a public forum, so that we might have the benefit of whatever information the Secretary could impart to us, whether there were nuances, whether there were refinements that we would not be aware of. We were denied access to a public press conference. That's not particularly an effort to establish a good working relationship with this committee.

Second, we did not receive the SSA's testimony until 8 o'clock this morning. Now, there is a 48-hour rule that is in effect as far as witnesses submitting testimony. Last year, we did not receive the testimony until the eve of the hearing; today not until 8 o'clock this morning. I don't mind telling the SSA witnesses, I have been sorely tempted to preclude you even from testifying this morning, but in the interest of trying to establish a full record, I am going to allow you to appear to testify. But in the future, if we have a hearing, or you know at least 1 month in advance that we're holding hearings on something as serious as this, and you don't submit testimony until morning, it will not be included in the record, and you will not be allowed to testify.

Before we call upon our first witnesses, I would like to yield to Senator Levin.

OPENING STATEMENT OF SENATOR LEVIN

Senator **Levin**. Thank you, Mr. Chairman. Thank you for your continuing leadership in this very critical area, and for your leadership on this subcommittee.

We're here today to continue our investigation of the social security disability insurance program, a program that has been in turmoil for the last 2 years. The turmoil has resulted from a congressional mandate in 1980 that disability beneficiaries be reviewed every 3 years and the Social Security Administration's premature and questionable implementation of that mandate. Social security disability insurance is not welfare. It is a promise to working Americans who have contributed to and supported the system and who, through no fault of their own, have suffered serious illness or accident that has resulted in severe physical or mental impairment. Social security disability insurance is an insurance program.

Employees pay into the program and employees must work a set number of years to earn these benefits. Therefore, these now disabled individuals do not come to their Government seeking a handout, but as rightful beneficiaries of an insurance program.

The Government has an obligation to treat these individuals fairly. We have an obligation to respond to the needs of these citizens in a just and timely manner, but we are failing in our efforts to meet that obligation.

In 1982, the Administration estimated that of all the individuals to be reviewed under a new accelerated review program, 20 percent would be found ineligible and terminated from the disability rolls. In actuality, and to almost everybody's amazement, these reviews have led to the termination of 45 percent of all those reviewed. In their efforts to weed out persons who should not be on the rolls, the Social Security Administration has terminated many individuals who were indeed severely disabled and entitled to benefits. This wholesale termination led to a dramatic increase in the number of appeals to administrative law judges. Between 1979 and 1982, the requests for administrative law judge appeal hearings almost doubled.

In response to this ballooning caseload, ALJ's have increased their workload, and the Social Security Administration hired additional ALJ's. However, none of these efforts have been able to stem the tide of an ever-increasing caseload.

In addition to increasing their output, ALJ's have also responded to the plight of many improperly terminated claimants. In the past 2 years, ALJ's have reversed two-thirds of all social security termination decisions appealed to them. This development has caused a great deal of concern in the Social Security Administration, Congress, and among the ALJ's.

There is something wrong with a system where the decisionmakers, when presented with the same facts, generate contradictory decisions, where the State disability offices are doing one thing and the ALJ's are doing another, where the outcome of your case often rests more upon the stage in which your case is being evaluated, rather than your actual medical condition and ability to work.

The disabled individuals caught in the midst of the confusion are suffering as a result of the inconsistencies present in the system.

In 1982, this subcommittee held a hearing to investigate the overall problems present in the social security disability insurance program. At that time, we found not only were many severely disabled individuals being terminated by Social Security, but there were problems surfacing within the system at the ALJ adjudication level, which will be the focus of our investigation this morning. Specifically, many ALJ's were beginning to feel that they were being pressured to decide more and more cases in less and less time, in an effort to keep up with the rapidly increasing caseload. In addition, there was also a feeling among the ALJ's that they were being pressured by Social Security to decrease their reversal rates, that is, to find less often for the claimant.

Moreover, we learned of some questionable remedial efforts that were being undertaken by Social Security. Specifically, in what has been explained as efforts to give uniformity to the decisionmaking criteria and evaluating process. Social Security has been incorporating into the social security rulings many of its internal guidelines, known as program operation manual systems or POMS. These efforts have apparently resulted in a twofold problem. First, there is the question of the legality and constitutionality of endowing these internal guidelines with the effect of law, because these guidelines are not subject to public or congressional review or comment.

Second, because ALJ's are not bound by POMS, but are bound by Social Security rulings, and because, in some cases, the incorporation of a POMS into a ruling has resulted in making the ruling inconsistent with the other standards by which ALJ's are also bound, ALJ's are more and more being faced with the dilemma of trying to figure out which standard to apply in evaluating a claim.

In addition, Social Security has adopted a policy of not acquiescing to certain adverse Federal circuit court decisions, and has thereby tried to strip them of their precedential weight and value. This, too, presents serious legal questions that appear to go to the very heart of the American jurisprudence.

These problems and practices, along with the ever-increasing number of persons being reviewed under the accelerated review program, present some frightening possibilities to many disabled Americans relying on social security disability insurance for their day-to-day survival.

Prior to 1980, 160,000 cases a year were reviewed. In 1981, some 350,000 additional cases were reviewed, and it is estimated that some 560,000 cases were reviewed in 1982, and some 840,000 cases will be reviewed this year. That is a 368-percent increase in just 3 years. Therefore, based on a Social Security Administration termination rate of 45 percent at the State level, some 400,000 disabled Americans can anticipate the possibility of being terminated from the disability insurance rolls during this year alone.

These figures become even more alarming when we take into consideration that up until recently an individual would have been without any kind of disability income, or income of any kind in some cases, from the time he or she is terminated, until the time he or she is reinstated by the ALJ, which in many cases has been from 9 months to 1 year. Moreover, the injustice of the situation is further compounded by the fact that of those claimants that appeal, two-thirds are found to have been improperly terminated, and are then reinstated by the ALJ. This protracted and biased adjudication process imposes an intolerable amount of financial and emotional anxiety and hardship on those least able to bear it.

There has been much congressional concern over the plight of disabled Americans on social security disability insurance. In an effort to alleviate and minimize some of these problems, Congress passed a bill last year that now enabled claimants who have been terminated during the appeals process to receive benefits up through the ALJ decision, but this provision expires on October 1 of this year.

Congress created the ALJ to be an impartial adjudicator in the regulatory process. The impartiality and independence of the ALJ is critical to the just and fair operation of the regulatory adjudicatory process. No one can question the need for provisions to insure that persons employed as administrative law judges perform their jobs properly. However, in order to insure that the ALJ's maintain a reasonable level of performance, we cannot tolerate any action that would impinge upon their impartiality or independence.

It is the responsibility of the agency with whom the ALJ is employed to see to it that the ALJ performs properly. Thus, the question here today is not whether or not the ALJ within the Social Security Administration may or may not be subject to managerial supervision by the Administration. Rather, it is whether the Social Security Administration has gone beyond its responsibility to insure the reasonable quality of the ALJ's performance to the point of interfering with the congressionally mandated impartiality and independence of the ALJ, and is thereby adversely affecting the rights of disability claimants.

I also want to join the chairman in his comments about yesterday's performance by Health and Human Services in denying access to a public press conference, where there was plenty of space available to congressional staff members to at least listen—which is all they wanted to do—to a public press conference by the Secretary of Health and Human Services.

There was no justification for this. It is intolerable. And I hope that this policy of the Secretary of HHS will be reversed.

I also join the chairman in expressing extreme displeasure at the fact that we did not receive the documents that we needed for today's hearing from the HHS until yesterday, and we did not receive the statements until this morning. The late receipt of these documents and statements are also intolerable.

Mr. Chairman, I again commend you on what you are doing, in your leadership of this subcommittee, your leadership in this area, and I look forward to today's testimony.

Senator COHEN. Thank you, Senator Levin.

Our first witnesses are Senators David Pryor and Congressman Pete Stark, both of whom have introduced legislation involving administrative law judges. Senator Pryor was formerly a member of the oversight subcommittee and participated extensively in our oversight hearings last year.

I would like to welcome both Congressman Stark and Senator Pryor to testify.

TESTIMONY OF HON. DAVID PRYOR, U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator PRYOR. Mr. Chairman, Senator Levin, thank you very much for allowing me to come this morning. I will make my remarks very brief. I will summarize the statement, but first, I would like to say how very much we are in your debt for not only having this hearing, but also playing such a vital role in trying to make this program, once again, make sense, and restore to it the dignity that we owe to the citizens of this country. I think everyone concerned about this whole matter owes a great debt of gratitude to both of you, and I commend both of you for your involement in this area.

Over this last 2 years, since the implementation of the 1980 disability amendments, it has become increasingly apparent that there's something terribly, terribly wrong with the way that the disability program is being administered. Immediately following the acceleration of the legislatively mandated triannual reviews, virtually every Member of Congress began hearing immediately from scores of constituents who not only felt the threat of benefit terminations but also the crashing down around them of an unbelievably inhumane bureaucracy.

It became more and more apparent that these problems were not just due to the fact that nonpermanently disabled individuals were being reviewed on a regular basis. Somewhere along the line, either through overzealousness or insensitivity, perhaps both, tens of thousands of individuals were wrongfully terminated. Those numbers translated into some very real physical, financial, and psychological damage to those individuals and their families.

Last year, while still a member of this subcommittee, I had the privilege of sitting in on oversight hearings which explored the whole disability termination isssue. Senators Levin and Cohen once again were at the forefront of this issue.

I had the privilege of hearing firsthand heartbreaking stories of wrongful benefit terminations. In addition to that, evidence was presented that the Social Security Administration and its agents in the various States were many times ill equipped to handle the accelerated reviews, medical evidence used was often poorly developed, different and conflicting standards were often used for disability terminations, and the review and appeals process was cruel and painfully lengthy.

In November 1982, I held a field hearing in Fort Smith, Ark., under the auspices of the Governmental Affairs Committee of the Senate and the Senate Committee on Aging, both committees, at which time, I was a member. It confirmed some of the problems that we learned about here in Washington.

In addition, through testimony, we heard of pressures placed upon physicians to restrict the amount of information given as part of medical evidence for SSA's files. These were instructions given to personal physicians as well as to SSA's consulting physicians.

I might add a footnote, or, let me say, an epitaph, to this particular hearing, Mr. Chairman. When I requested SSA to testify, to bring forward their facts and to defend this particular program, they refused in writing to come to this particular meeting.

I might also say that some 600 individuals from this area of our State came, many of whom had the opportunity to testify. Of course, it was impossible to hear all of them. We heard about the degree to which the Social Security Administration had attempted to limit the administrative independence of the ALJ's through intimidation. Judges had been flown to Dallas and to Washington for retraining. They have been placed, at different times, under 100 percent review by the SSA in Baltimore for every allowance of benefits, and pressure has been placed upon them not to comply with precedent-setting Federal district court rulings.

These revelations are most disturbing, as they imply an attempt on the part of SSA to undermine the system of checks and balances within the disability program which protects the rights of the individuals. Because of my concern, Mr. Chairman, about this pressure on ALJ's, and the eroding of the system, I have introduced S. 1206, a bill which would prohibit the Social Security Administration from electing individual data on ALJ's with respect to the number of claims they allow or deny.

Finally, Mr. Chairman, I have only summarized what I believe the witnesses here today will confirm. During the last Congress, we were successful in some stopgap reforms in the administration of this disability program. I believe there is a growing acceptance of the fact that we will need to do even more to reform the system, and this work will have to be done in the coming months. I also sense a growing feeling that the issues of SSA's management practices with respect to its administrative law judges must be reviewed by the Congress of the United States. I know the record of this hearing will go a long way toward contributing to the solution of these problems.

One final footnote, Mr. Chairman, about a case that we were working on in our Little Rock, Ark., office for an individual named Mr. Marvin Hetherington of North Little Rock, Ark. Mr. Hetherington was suffering from arthritis, severe arthritis of the neck and the spine, which resulted in severe and constant pain. It rendered him incapable of continuing his job. He was suffering from high blood pressure. SSA's termination notice came to him November 10, 1982, and that notice stated that, although his movement was somewhat limited, he could continue his job of the past 25 years.

On May 11, less than 1 month ago, Mr. Hetherington died, before the administrative law judge, Newburn Chambers—of an aneurysm which could have well been caused from the worry and the anxiety of benefit terminations. One of the saddest aspects of this case was that the judge said that even had Mr. Hetherington lived, his benefits might not have been continued because his medical file did not contain sufficient information.

Another individual who had had several heart bypass surgeries arrived at the Social Security office recently, in Little Rock, Ark., for his face-to-face interview. During this particular interview, he suffered a massive coronary heart attack.

And one of the witnesses that testified at Fort Smith, a Mrs. Coleman, an SSI disabled individual, testified at that particular hearing and appealed her denial—she was reinstated at the ALJ level, and immediately following this hearing and her testimony this decision was remanded.

Mr. Chairman, I think this whole system has become very, very inhumane, and I applaud you once again for looking into it, and you have my full support for any corrective action that you wish to pursue.

[Senator Pryor's prepared statement follows:]

PREPARED STATEMENT OF SENATOR DAVID PRYOR

I want to commend Senators Levin and Cohen for calling this hearing today to examine the role of the administrative law judges of the Department of Health and Human Services related to social security disability, and the pressures being placed upon them to disallow benefits to deserving recipients.

Everyone concerned about this matter owes a debt of gratitude to both Senators for their commitment to reformation of this controversial program.

Over the last two years, since the implementation of the 1980 disability amendments, it has become increasingly apparent that there is something terribly wrong with the way the disability program is being administered. Immediately following the acceleration of the legislatively mandated triannual reviews, virtually every member of Congress began hearing from scores of constituents who felt the threat of benefit terminations. And with each new story it became more and more apparent that these problems were not just due to the fact that non-permanently disabled individuals were not being reviewed on a regular basis. Somewhere along the line either through overzealousness or insensitivity, tens of thousands of individuals were being wrongfully terminated. And those numbers translated into some very real physical, financial and psychological damage to these individuals.

Preliminary estimates indicated that, rather than the expected 20 percent error rate in the program, SSA was terminating 45 percent of those on the rolls. And instead of the expected $10 million forecast in savings from elimination of those ineligible, the President's fiscal 1983 budget projected savings of $3.5 billion.

Last year, while still a member of this subcommittee, I had the privilege of sitting in on an oversight hearing which explored the whole disability termination issue. Senators Levin, Cohen and I heard firsthand some heartbreaking stories of wrongful benefit terminations. In addition to that, evidence was presented that the Social Security Administration and its agents in the various states were many times ill-equipped to handle the accelerated reviews; medical evidence used was often poorly developed; different and conflicting standards were often used for disability determinations; and the review and appeals process was cruel and painfully lengthy.

In November of 1982 I held a field hearing in Ft. Smith, Arkansas, which confirmed some of the problems we learned about in Washington. But in addition, through testimony we heard of pressures placed upon physicians to restrict the amount of information given as part of medical evidence for SSA's files—and these were instructions given to personal physicians as well as SSA's consultative physicians.

Most importantly, at this hearing we heard from a panel of administrative law judges from the Fort Smith area. These judges testified about the degree to which the Social Security Administration has attempted to limit their administrative independence through intimidation. The judges have been flown to Dallas or Washington for "retraining"; they have been placed at different times under 100 percent review by the SSA in Baltimore for every allowance of benefits; and pressure has been placed upon them not to comply with precedent-setting federal district court rulings. These revelations were most disturbing, as they imply an attempt on the part of SSA to undermine the system of checks and balances within the disability program which protect the rights of individuals.

Because of my concern about this pressure on ALJs I have introduced S. 1206, a bill which would prohibit the Social Security Administration from collecting individual data on ALJs with respect to the number of claims they allow or deny.

I have only summarized what I believe the witnesses here today will confirm. During the last Congress we were successful in making some "stopgap" reforms in the administration of the disability program, but I believe there is growing acceptance of the fact that we will need to do even more to reform the system, and this work will have to be done in the coming months. I also sense a growing feeling that the issue of SSA's management practices with respect to its administrative law judges must be reviewed by Congress. And I know the record of this hearing will go a long way toward contributing positively to resolution of these problems.

Senator **Cohen**. Thank you very much, Senator Pryor. Congressman Stark.

TESTIMONY OF HON. FORTNEY H. (PETE) STARK, U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative **Stark**. Thank you very much, Mr. Chairman, Senator Levin, for having these hearings and making it possible for me to testify. I hope that my tardy testimony will be submitted for the record, and I can summarize and add a few remarks and observations.

First of all, I think that your hearings will accomplish two things. The main thrust of these hearings, as I understand it, is to deal with the problem of management in the administrative law judge area. I am not an attorney, but in hearings that we held Monday in the San Francisco area, in the area of mental disabilities, and mentally disabled people being terminated, it became apparent that the administrative law judges are on commission, and that may be an interesting way to compensate people who hand out parking tickets, but at least as I remember from elementary civics, that's not really a very good way to compensate somebody in a judicial position.

We were unable to get SSA to cooperate in providing witnesses, but we were able to get the Federal Government employees union to bring some of their members in to testify. These workers examine applicants for benefits in the local SSA office, and the stories that we heard were indeed horror stories.

I would like to make a transcript of our hearing, as soon as it is available to us, available to you and your staff for you to summarize. But suffice it to say that if you were going to design a system to deal with people who are disabled and you were looking for somebody to direct the system as it is now administered, you would require that the person have the heart of a Doberman pinscher and the mind of a piranha fish. This would put them in the proper reference for the way that the program is going. The idea seems to be that if we throw people off the disability roll, they will then go to work, and that will sort of prove that they have been cheating all along. That is done, I think, in no other system in our country.

We tried to elicit from the workers in the SSA office where the opportunities were to cheat. This really seems to be the fear, that somebody is out there cheating us out of, in the SSI question, a couple of hundred dollars a month—overlooking the fact that most of those people, if they were not getting a couple of hundred dollars a month, would be receiving general assistance or State assistance or, in many cases, would go on the streets and end up in jail, which in the good State of California would cost us $230,000 a year, to institutionalize them. So the first cost in these cases may often be the lowest cost.

There is some opportunity for cheating. If you wish to go before a group of examiners and convince them that you are crazy, I suppose you have the opportunity to get a couple of hundred dollars a month and cheat that way. The most common form of cheating, and the one that's easiest for us to discover, which requires the collusion of an employer, is for someone to be working, and generally receiving a cash payment from an employer, and still collecting disability.

Further, I would submit that terminating people on disability is not the way to find those cheaters and punish them, put them in jail, as I understand the law provides, if it is a serious enough case. I think we have adequate ways to deal with that. If that is the issue, we should enforce the law in that area.

So I am hoping that Senator Pryor's and my legislation or the legislation resulting from these hearings will free the judges at least to do what they see is the right thing to do.

I understand there are some problems in the management of a large number of administrative law judges. However it seems to me that other Federal, State, and county courts have worked out ways through peer organization reviews to see that justice is administered efficiently in our country. I have a hunch that following the traditional methods of managing the judicial process would be more fair than literally ascribing people a certain number of convictions and saying "if you don't get your share, you're out of the ball game."

The present disability program hardly seems like the American tradition, and I commend you for holding this hearing. I'm sure you're going to hear a lot more of the horror stories, and I appreciate the opportunity to be with you this morning.

I'd be glad to answer any questions.

[Congressman Stark's prepared statement follows:]

PREPARED STATEMENT OF CONGRESSMAN FORTNEY H. (PETE) STARK

SOCIAL SECURITY DISABILITY REVIEWS AND ADMINISTRATIVE LAW JUDGES

Mr. Chairman, Members of the Committee:

Thank you for this opportunity to testify.

We meet on the morning of some long-overdue good news—good news about restoring some humanity to Social Security disability policy.

But I am glad you did not cancel this hearing—we have a lot of work to do to restore fairness and faith in the system. I also believe that the mere fact of a hearing such as this helps bring about the type of change announced yesterday.

This Monday, I chaired a field hearing of the Ways and Means Public Assistance Subcommittee in the San Francisco area on the subject of SSI Mental Disability reviews. I would like to make a transcript of that hearing available to your staff. It contains eloquent documentation from the field of the horror stories we have been hearing: of people clearly, clearly unable to work being denied benefits; of those people then suffering increased financial, emotional, and medical problems; of hard-pressed State and local governments and charities being overwhelmed with the cost and burden of the lives wrecked by this Federal penny-pinching policy.

The hearing transcript reads like the opening chapters of a Dickens novel, but there is no happy ending in these cases, and it is sad to see Uncle Sam play the part of Uncle Scrooge to the terminally sick and disabled.

I would also like to bring to the attention of this Committee some very disturbing testimony I received Monday from a SSA claims representative in California. This representative testified—and it would be worth checking in other areas—that virtually all of the allowances by ALJs are being re-examined within a year after their hearings. Because of the delays in the processing program, this means that the cases are again reviewed within a matter of months after the first check is issued. This means that disabled and frequently unstable people are asked to suffer through the pain and cost of another review process shortly after being declared disabled. If this isn't harrassment, I don't know what is.

The Administrative Law Judges who will testify today have sued the Social Security Administration arguing that they are being pressured to decide a certain level of cases, about ⅔rds, in favor of the Government and against the people. I have joined with a number of other House Members in an amicus in support of the ALJs.

But as legislators, I believe we should legislate when we see a problem. Therefore, I, along with Senator Pryor, have introduced legislation to give the ALJs some protection, some assurance that Big Brother is not looking over their shoulder and pressuring them to decide "x" number of cases pro-government.

We have a major problem—convincing the millions of people who will be legitimately denied benefits over the next decade that their case was decided fairly and honestly, and that their investment in Social Security was not ripped off. Judges must be like Caesar's wife. And when Caesar's wife falls off the podium, it takes strong medicine to lift her back on again. Our bill is strong: it takes away the management tool of allowing SSA to look at the decision ratios of individual ALJs, but it allows that such data be presented in some aggregate form, so that only broad trends and generic problems can be dealt with.

Management will scream, but let them. Their screams are much less pathetic than the screams of real pain we are hearing from the disabled today. It is the only way I know to ensure that we restore faith in the System, in Government, and "Trust" in the Social Security Disability Trust Funds.

As for weeding out the ALJ who plays golf five afternoons a week, I think that problem can be addressed, perhaps within the ALJ association and through peer pressure and counseling among the Judges themselves. It does not need to be managed by OMB.

Mr. Chairman, the need to control social spending may require limits to our compassion; it does not grant a license for meanness. I hope you can develop ways to overturn a practice which strikes at the very heart of our ideal that justice must be fair and impartial.

Senator **Cohen**. Thank you very much, Congressman Stark, Senator Pryor.

No questions, just an observation about the horror stories. You may recall, Senator Pryor, last year, it was alleged or at least sugested by administration witnesses that this committee had an opportunity to demagogue this issue, and I took great offense at that suggestion. First, I took the unusual step of not allowing other Senators to testify on the matter because we didn't want to turn it into a political event. So no Senators were allowed to even testify during our opening hearing. That was a very unusual step taken.

Second, there were no witnesses who were currently on disability to be wheeled into the table here to testify and show how bad the decision affecting them really was.

We tried to conduct the hearing in a most dispassionate way to see whether or not there was a serious problem with this law. We mandated the law; we mandated the review process: How is it being carried out?

We found out essentially there were four problem areas. No. 1, there was inadequate notice. People were being sent a short notice saying "your case is up for review" and not being told that they had the full burden of proof to come forward and reestablish their medical disability with new information, that old information would not be considered in the record.

No. 2, there was no human contact, absolutely no human contact until such times as the case went to the ALJ. That was the first time those individuals had any human relationship with the decisionmakers.

No. 3, there was no uniformity in the rules that are applied at the State level by the State examiners and those by the ALJ's. And No. 4, there was no payment during the appeals process which lasted anywhere from 1 year to 18 months.

These were the four essential problem areas we tried to work with, and the administration has taken some steps to correct them but, it seems to me, always under pressure from congressional criticism. Even yesterday's declaration was only a half step: some decisions that were made were in a positive vein; however, the SSA would only continue the payments through reconsideration, whereas our temporary legislation continues benefits all the way through the ALJ stage.

So what we're trying to do is not use the horror stories to try to embarrass anybody, but to point out that there are indeed horrible injustices taking place, and see if we can't handle the problem in a fairly rational and sensible way.

Representative **Stark**. If I may, Mr. Chairman, I think the thing that's difficult to understand is the importance of these small checks to someone, and the idea that a window envelope, a Government window envelop to somebody who's hurt in their community that other people are losing their only means of support—and this envelope looms as large as a billboard to some people—it's very scary.

The chairman, Senator Levin, Senator Pryor, we're used to testifying; I don't think the procedure bothers us greatly. I think it's hard for us sometimes, and I'm sure it's equally true for the administrators in SSA to get any feeling of how insecure and disenfranchised these people feel, and I don't know how we can extend that understanding.

I hope perhaps some of the stories will personalize it for the people who have to both write the laws or administer them.

Senator PRYOR. Mr. Chairman, on the mandate—we hear an awful lot about the congressional mandate—and I assume we're talking about the 1980 Bellmon amendment. I think if we would go back and really do some research into that particular legislation, specifically dissecting that language and attempting to find the legislative intent, by no stretch of the imagination can anyone in good conscience believe that that mandate extended to a program of this magnitude, nor did the Congress expect the lack of sensitivity that these reviews have brought out.

As I recall, there was very little debate, and the executive language was very short and sweet. It basically mandated, I guess you would say, that something be done about it, but nothing on the magnitude to create the horror stories that we have wrought as a result of that so-called mandate by the Bellmon amendment.

Senator LEVIN. I might add we have indeed gone back and reviewed that legislative history, and you're 100 percent correct.

Senator PRYOR. Thank you, sir.

Senator COHEN. Thank you very much. The next panel of witnesses are the representatives of the Social Security Administration, Louis Hays, Donald Gonya, and Irwin Friedenberg, who will present the administration's views to the subcommittee.

TESTIMONY OF LOUIS B. HAYS, ASSOCIATE COMMISSIONER FOR HEARINGS AND APPEALS AND ACTING DIRECTOR TO THE DEPUTY COMMISSIONER FOR PROGRAMS AND POLICY, SOCIAL SECURITY ADMINISTRATION, ACCOMPANIED BY DONALD A. GONYA, ASSISTANT GENERAL COUNSEL, SOCIAL SECURITY DIVISION, OFFICE OF GENERAL COUNSEL, HEALTH AND HUMAN SERVICES; AND IRWIN A. FRIEDENBERG, DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE, OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION

Mr. HAYS. Mr. Chairman, I'm pleased to appear before you today to discuss the role of the administrative law judge in the social security disability program.

I'm accompanied this morning by Mr. Donald A. Gonya, on my immediate right, Assistant General Counsel, Department of Health and Human Services, Social Security Division; and on my immediate left, by Irwin A. Friedenberg, Deputy Chief Administrative Law Judge of the Social Security Administration's Office of Hearings and Appeals.

You have asked that I address three principal matters of concern to the subcommittee: the independence of administrative law judges, how we use Social Security rulings, and your policy on adherence to court decisions, the so-called nonacquiescence issue.

Also I have appended to my statement a brief explanation of the disability appeals process.[1]

The Social Security Administration has always guaranteed the independence of administrative law judges with regard to individual case adjudication. This independence is provided to protect the rights of the individual claimant to a full and fair hearing by an impartial decisionmaker. No attempt is ever made to influence the outcome of a particular case, and ex parte communications from the agency are prohibited.

Furthermore, there is not now and never has been a goal or quota established for acceptable allowance or denial rates.

Administrative law judges are further guaranteed freedom from agency pressure in their decisionmaking role through their appointments pursuant to the Administrative Procedure Act. In addition, their independence is protected by some specific mechanisms; for example, hiring and selection criteria and compensation are established by the Office of Personnel Management, not by the agency. Also, adverse personnel actions such as removals or suspensions may be taken only when good cause is established before the Merit Systems Protection Board after opportunity for a hearing.

Nonetheless, some concerns have been raised about whether this independence has been affected by two activities that have been undertaken in recent years: The first one is our implementation of the congressionally mandated review of administrative law judge decisions generally referred to as the Bellmon review.

Through the 1970's there was increasing congressional concern about the high overall percentage of cases allowed by administrative law judges, the wide variance in allowance rates among individual ALJ's and the fact that generally the Social Security Appeals Council reviewed only those administrative law judge decisions denying benefits.

In response to those concerns, the Congress enacted the Bellmon amendment as part of the 1980 disability amendments. That amendment required SSA to institute a program of ongoing review of administrative law judge decisions on claims for disability benefits and to submit to the Congress by January 1982 a report on the agency's progress toward implementation of that program.

To fulfill the study requirement, the Social Security Administration undertook a one-time random sample review of 3,600 ALJ decisions, both allowances and denials. The major findings of that review, which were included in the report sent to the Congress, included: First, significant differences in disability decisions resulted when decisionmakers used standards and procedures govening State agencies when they used those governing administrative law judges, and second, there was a higher probability of error in favorable decisions of those administrative law judges with high overall allowance rates.

Following this one-time study, the Social Security Administration implemented an ongoing review beginning in October 1981. At that time a review of about 7½ percent of all administrative law judge allowance decisions in disability cases was selected from those ALJ's with the very highest allowance rates.

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[1] See p. 41.

Our decision at that time to use allowance rates as the basis for selecting administrative law judges for review was based on congressional intent and the Bellmon report finding that decisions of high allowance rate administrative law judges would be the most likely to contain errors. However, once under review, the ALJ's allowance rate became irrelevant. The sole criterion for keeping or removing ALJ's from Bellmon review was and is the accuracy and quality of their decisions.

In April 1982, the Bellmon own-motion review program was enlarged to 15 percent of all administrative law judge allowance decisions, and the case selection criteria were redesigned and expanded. We added a national random sample of all administrative law judges allowance decisions, referrals from the social security component responsible for implementing ALJ decisions, and the decisions of all newly hired administrative law judges.

At the present time we no longer use individual ALJ allowance rates in selecting ALJ cases for review. In fact, to date, 44 administrative law judges have been taken off Bellmon review and 9 ALJ's have been placed on review solely on the basis of the quality and accuracy of their decisions and totally without regard to whatever their allowance rates might have been.

Although we review only allowance decisions under the Bellmon review, the Appeals Council in fact reviews far more denial decisions than allowance decisions. For example, in fiscal year 1982, the Appeals Council reviewed approximately 65,000 cases in which claimants had appealed unfavorable hearing decisions from ALJ's. During this same period, only about 12,000 favorable hearing decisions were reviewed under Bellmon.

To place the matter in further perspective, of the 77,000 decisions reviewed during fiscal 1982, only about 8,000 were from administrative law judges initially selected for review on the basis of their unusually high allowance rates.

I would like to add that SSA takes no action against ALJ's on the basis of their allowance rates. Because experience confirmed the higher probability of error by high allowance rate administrative law judges, we believe we correctly concentrated on this group of administrative law judges at the start of the own-motion review program. We believe that Social Security's approach in implementing the congressionally mandated Bellmon review has helped to insure the quality and correctness of ALJ decisions and does not threaten the impartiality of those decisons. The Bellmon review has also been helpful in identifying those areas where social security policy must be more clearly articulated, and in identifying additional training needs.

The second area of concern is the allegation that the Social Security Administration has a goal or quota requiring individual administrative law judges to produce a given number of final dispositions per month. No such goal or quota exists, and no improper pressure is applied to ALJ's to increase their productivity.

Before discussing this issue further, I believe it will be helpful to briefly discuss the workload we are facing. SSA's hearing workload is large and continually increasing. A record high of 320,680 hearing requests was received in fiscal year 1982. In the first half of fiscal year 1983, we have received 170,205 requests. Our pending caseload as of the end of March has increased to 164,109 cases. To address this situation, we have taken a number of steps that enable administrative law judges to make more case dispositions, and we have also hired 140 more administrative law judges.

A list of the major steps we have taken to assist the administrative law judges to increase overall productivity is appended to my testimony. These measures have been effective—ALJ's handled an average of 34.5 cases per month in fiscal year 1982. By contrast, in fiscal year 1980, the average was 30 per month. This increase of over four cases per administrative law judge is a major step toward keeping up with the workload. It means that we clear roughly 40,000 more hearing requests per year. And, recently, administrative law judge productivity has been even higher. In March, the administrative law judges averaged almost 39 dispositions, and 314 administrative law judges disposed of 40 or more cases each.

I believe that this level of productivity is the result of our administrative efforts to give the administrative law judges the resources they need, and equally, if not more importantly, the dedication and desire of all OHA field staff, both administrative law judges and support staff alike, to provide as many claimants as possible with full, fair, and timely hearing decisions.

As I previously mentioned, we have no goal or quota for individual ALJ productivity. However, all Social Security Adminstration employees, including administrative law judges, are required to perform at a minimally acceptable level of efficiency and proficiency and to work to the full extent of their capabilities. In order to achieve this end, the chief administrative law judge monitors the productivity of the ALJ's. This is an ongoing process, and periodically those administrative law judges whose production averaged 20 or fewer final dispositions per month over at least a 6-month period are put on notice by the chief ALJ that their decisional output was considerable below the norm established by their peers. They are asked to improve their productivity and to advise their respective regional chief administrative law judges of any assistance they require to improve their productivity. In the vast majority of cases, these ALJ's have been able to improve their decisional output, sometimes dramatically.

In three instances I have filed complaints with the Merit Systems Protection Board, seeking the removal of three adminstrative law judges who were unable or unwilling to improve their decisional output. In one case we have received a recommended decision from the adminstrative law judge who presided for the Merit Systems Protection Board at the hearing, finding that there was in fact good cause to remove our adminstrative law judge for inefficiency. This case is still before the board pending issuance of a final decision. In the second case we are awaiting a recommended decision from the board's administrative law judge. Finally, the third case was dismissed on request of the parties after our administrative law judge retired.

Perhaps some ALJ's feel pressure because of these efforts, but I do not believe it is improper pressure. We have an obligation to the taxpayers and the claimants to insure that each administrative law judge maintains a minimally acceptable level of decisional output.

The decision to put an administrative law judge on notice that his or her decisional output is unacceptable is made on a case-by-case basis after consideration of all the facts, including any extenuating circumstances which may explain the low decisional output. The same holds true for any decision to file a complaint against an administrative law judge before the Merit Systems Protection Board.

As the committee is undoubtedly aware, the issues of ALJ performance and the way the Bellmon review has been implemented are the subject of a lawsuit brought by the Association of Administrative Law Judges. The legal basis for our position is fully spelled out in two briefs we have filed in that case.

I would like to submit copies to the committee and ask that they be made part of the record.[1]

I would also like to discuss the social security rulings and the rulings initiative which we undertook about 1 year ago.

Social security rulings consist of selected decisions of the Federal courts, administrative law judges, the Appeals Council, and our Office of the General Counsel, and contain interpretive policy statements by the Social Security Administration. Rulings are issued by the Commissioner of Social Security and, by regulation, are binding on all components of the Social Security Administration.

As the result of a study by the General Accounting Office, the Bellmon study and the early results of the ongoing Bellmon review, it became evident that there were inconsistencies in interpretation of policies between the various levels in the SSA adjudicatory system as well as within the same level. In looking at ways to reduce this inconsistency, SSA considered placing the program operations manual system, the so-called POMS, into the rulings so as to make them binding on adjudicators at all levels, including administrative law judges.

However, in carefully examining the POMS, it was determined that the POMS, as written, did not contain sufficiently detailed guidance in a number of areas in which decisional inconsistency had occurred. Therefore, rather than placing the policy material of the POMS directly into the rulings, SSA prepared a series of rulings to provide a uniform set of policy statements and interpretations for adjudicating disability cases. These rulings provide a further explanation of the standards already in the regulations. Many of these new rulings provide more specific policy guidance than that which was previously contained in the POMS.

I might add that SSA has been criticized for not making the recently issued rulings subject to public notice and comment. This criticism reflects a rather widespread misunderstanding of the nature and scope of the rulings. As I mentioned, the rulings do not change the standards set forth in the regulations but are merely interpretations of those regulations and agency policy.

Senator COHEN. If you eliminate pain as a factor to be considered, does that not change the outcome?

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[1] The material referred to is retained in subcommittee files.

Mr. HAYS. I am sorry, Mr. Chairman. We have not eliminated consideration of pain.

Senator COHEN. What did you eliminate in the POMS on the consideration of pain?

Mr. HAYS. There was a period of time prior to the issuance of the rulings that have been published over the last year, where it is my understanding that the section in the POMS was silent on the question of pain. That silence was corrected, to the best of my understanding, in the POMS and has, I also understand, specifically been addressed in a social security ruling. That gap in the POMS was something that existed at some time in the past. I am not intimately familiar with when that occurred, but it has been corrected.

Each proposed ruling is carefully reviewed by our Office of the General Counsel to assure that it is consistent with existing law and regulations. The Administrative Procedure Act specifically permits an agency to publish interpretations of policy without going through the rulemaking process.

I would also like to make the point that the use of the rulings to promote uniform adjudication does not infringe on the decisional independence of the administrative law judges. ALJ's are decisionally independent, but they are bound to follow the policy and statutory interpretations of the agency in deciding cases. By statute, the Secretary is charged with holding hearings and issuing decisions in social security cases. Obviously, due to the volume of cases, no Secretary could perform this function personally. Consequently, this function has been delegated to administrative law judges. In issuing a decision, an administrative law judge must follow the same regulations and rulings as the Secretary would have followed had he or she actually personally held the hearing.

You also asked that I address our policy on compliance with court decisions. The Social Security Administration of course is bound by every court's decision as it applies to the plaintiff bringing the action unless and until it is reversed on appeal. SSA does not, however, consider itself bound with respect to nonlitigants by each decision of the various district and circuit courts.

This policy is necessary to enable SSA to administer the social security program nationwide in a uniform and consistent manner, as Congress intends. Indeed, the executive branch could be considered to be abdicating its responsibilities if it turned over the determination of agency policy to each of the 94 district courts or 12 circuit courts that might render an opinion on an issue.

In addition, often within the same circuit or district, courts reach different decisions on the same issue. In a program of national scope it would not be equitable to claimants and beneficiaries to subject claims to differing standards depending on where the claimants reside.

Senator COHEN. Why not just appeal the case to the Supreme Court?

Mr. HAYS. Many times that occurs, such as in the most recent major social security case, the *Campbell* decision, in which the Supreme Court did uphold the major provisions of the disability regulations. That case, even thought it has been nonacquiesced in at a lower level, was appealed up through the channels, and we did receive a favorable Supreme Court decision.

Senator COHEN. Isn't that a better way of handling adverse decisions rather than forcing the claimants to deal with the issue and ignoring the existing ruling within the circuit? Why put them to the burden?

Why don't you assume the burden, go to the Supreme Court and have it resolved?

Mr. HAYS. Perhaps given the legal nature of the question. I might defer that question to our General Counsel, Mr. Gonya.

Mr. GONYA. Yes, Mr. Chairman, I think there are several reasons why a particular case might not be appealed to the Supreme Court.

Certainly, if the notion is that when you receive a lower court decision you either have one of two choices, to acquiesce or else appeal to the Supreme Court, I think, as the Center for Administrative Justice in its study of the administrative appeals process in the Social Security Administration in 1977 properly pointed out, there may be many good reasons for doing neither.

I think we are all familiar with the very heavy workload of the U.S. Supreme Court. The ultimate decision as to whether the Government appeals a particular case to the Supreme Court rests with the Solicitor General. However, I would submit that there could be a host of reasons why in a given case it might not necessarily be appropriate to acquiesce on its policy principle, but the case also would not compel Supreme Court review.

Senator COHEN. What happens if the court says, in our judgment we feel you have to show medical improvement before you can discontinue social security disability payments—a very substantial ruling on the part of the circuit court—and you simply decide not to appeal because you are concerned about the caseload of the Supreme Court?

Does that case conflict with policy guidelines of the administration?

Mr. GONYA. I think it is more than that, Mr. Chairman. I think also, when you look at some of the court decisions that have proposed that disability termination not occur unless there has been medical improvement, in many instances that is just the issue that has been before that court in that case.

Perhaps the administrative law judge, in his administrative decision, has engaged in a discussion as to medical improvement, but before that court there may not have been a question as to whether the plaintiff has cooperated in establishing his disability.

And, the Congress has said in our Social Security Act the burden lies on the claimant. There may not have been an issue before that court as to whether the claimant has engaged in employment so as to have excess earnings.

So, while some courts have concluded that medical improvement has to at least be shown, I would submit that that probably is the only issue that has been presented to the court in that particular case.

Senator COHEN. That is a question of law, not one of the facts, as far as the interpretation of whether that has to be shown.

I realize you don't want to get involved in discussion of factual matters. They might differ in different jurisdictions, but that is a fundamental issue, is it not, of whether or not the burden is upon the administration or the claimant to demonstrate medical improvement?

Isn't that something that would be of fundamental importance in determining these types of disability cases?

Mr. HAYS. Mr. Chairman, perhaps I can add——

Senator COHEN. Why don't you finish? I am going to discuss this at great length.

Mr. HAYS. Therefore, the Social Security Administration has had a longstanding practice, not a new practice but a longstanding practice, which is also used by other Federal agencies, of publishing a ruling stating that it will not adopt a particular court decision as agency policy. There are seven such rulings in effect now.

A full description of the legal basis for nonacquiescence is included in a brief we have filed with respect to a pending court case, *Lopez* v. *Heckler*. I have provided the committee with a copy and ask that it be made part of the record.[1]

Mr. Chairman, we believe that our objectives are the same as those of this committee, to assure that due process of law is provided to claimants in an adjudicative setting that is free of prejudice and inappropriate constraint and that the program is administered uniformly in a socially and fiscally responsible manner.

We believe we are meeting those objectives.

That does conclude my statement.

Senator COHEN. Thank you, Mr. Hays.

At a recent hearing before Senator Heinz' Aging Committee, the GAO testified that State disability claims examiners perceived a message from SSA to "deny, deny, deny disability benefits."

Similarly, the administrative law judges who will be testifying later here this morning also believe that the SSA is pressuring them and cite a survey of ALJ's which found that 70 percent of those responding felt there was agency pressure to deny claims.

The question is: If you say that this is not your intent, why is there such a widespread and pervasive feeling at the State examiner level and by ALJ's that the pressure is on the deny disability claims? Or are they all just paranoid?

Mr. HAYS. I have to say that I am not familiar with the questionnaire to which you refer. It would be my impression based on travels around the country and my personal discussions with the great majority of our 800 administrative law judges that in fact the average administrative law judge does not feel under pressure to deny benefits.

Senator COHEN. How did you come to that conclusion, How many conversations have you had?

Mr. HAYS. I have talked with probably 600 or so of our 800 administrative law judges, either one-on-one or in meetings where everybody had a full opportunity to ask questions and talk and make comments. And I can honestly say that I have just not gotten that impression. I just do not think that that is the prevailing sentiment on the part of the average administrative law judge.

With respect to the overall decisionmaking process, including State disability examiners who make the initial decision and the people who review those initial decisions, again it is my profound belief that there has never been any official position taken and/or communicated to those individuals that people are supposed to try to deny benefits or that the climate is one of deny, deny, deny.

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[1] See p. 403.

However, when one looks at the history of the disability program, I think that what in fact we have seen at the frontline level, the frontline eligibility worker level, if you will, is a natural bureaucratic reaction to the substantial criticism that had been leveled at the disability program in the late 1970's culminating with the disability amendments of 1980, which in effect charged that at that time the disability program was too loose, too wide open, and that there was wholesale ineligibility among people on the rolls.

And I think that in the good-faith attempts of the frontline people to correct those problems that were brought to their attention, perhaps there was a tendency to assume that that meant that they were expected to deny or terminate cases even though obviously that was not the situation.

Now, one of the things that we are doing, one of the things that is, in effect, part of the Secretary's disability plan, is to absolutely underscore, reestablish, do everything we can to publicize to everybody involved in this disability program that the only standard is one of accuracy, quality, fairness, and objectivity.

People are not expected to deny benefits when in doubt. People are not expected to pay benefits when in doubt. People are expected to make the best possible decision. And we have a number of steps under way to make sure that there is no misunderstanding that those are the rules and that that is the adjudicative climate we are operating in.

Senator COHEN. Has the composition of ALJ's changed much since 1978? Big turnover, little turnover?

Mr. HAYS. Two things have happened. There has been a turnover to some extent. But the biggest change has been a rather significant increase in the number of administrative law judges. We hired 140 new ALJ's last year.

Senator COHEN. Would it be your judgment that the ALJ's historically have been something akin to sluggards, that they have been lazy?

Mr. HAYS. No; I certainly would not characterize administrative law judges in that way.

Senator COHEN. You have set a production goal of about double the amount they were handling as of 1978. In other words, you want them to go twice as fast.

I was thinking, as you were testifying about how the production goals have been increased, about that movie, "I am Dancing as Fast as I Can." And I am just wondering how fast do you want them to dance in the process of increasing the number of dispositions whether or not there is a sacrifice in quality? I have two impressions from your testimony: either, one, they are working at half capacity or half speed; or two, they are incompetent.

Mr. HAYS. I am certainly sorry if I conveyed that impression to you, Mr. Chairman.

Senator COHEN. I will tell you why you conveyed it: because what you used as a standard is to look at the allowance rate. You said you have conducted a study and decided that those cases where there is a higher example of allowances or disability payments, those are the ones to be selected for review.

The question that occurs to my mind: What about those cases where there has been a denial at the administrative law judge level? Why is that not an indication of error as much as an approval decision?

I could cite to you case after case. Let me give you a hypothetical. Let us suppose that at the State examiner level a person was in a body cast or an iron lung and had his disability payments terminated. And that was appealed to the ALJ, and the ALJ approved the termination of disability. Is that a mark of efficiency or competence because he did it in a period of 1 day or 1½ days and approved the decision at the lower level?

Mr. HAYS. Mr. Chairman, the problem I am having in responding to your question is that there is no connection between the issue of productivity of the adminstrative law judges on the one hand and the issue of allowance or denial rates of administrative law judges on the other.

Senator COHEN. There are two separate issues: No. 1, you have dramatically increased the production rate, saying, let us speed it up; we have got to get these things moving; we have a big backlog. Right? So we want to speed the production line up a little bit faster. You must dispose of these cases faster because we are not getting them through the pipeline fast enough.

I submit to you that that has direct bearing upon the quality of the decision that is going to be made.

Mr. HAYS. May I respond to that?

Senator COHEN. That is one issue. The second issue is how you manage to select those cases in which ALJ's have been reversing the State examiner and allowing the disability claims. You selected those ALJ's for study as to whether or not they were really doing their jobs.

What I want to submit to you is you did not apply the same standard to those ALJ's who denied benefits. I would also submit to you that there is just as equally great a probability that the person denying made an error as the one who approved allowance of benefits.

Now you can deal with those separately if you would like.

Mr. HAYS. First, with respect to the issue of what the administrative law judges have been and are today accomplishing in the way of disposing of cases. I did not testify to increasing production goals. My testimony was to the actual results of what the administrative law judges have actually accomplished. And in fact, the administrative law judges have significantly over the years increased their productivity. In fact, over about a period of 5 years, they have essentially doubled their output.

Senator COHEN. What is the production goal that SSA has set?

Mr. HAYS. We have not established a production goal. I have predicted—and the judges in fact are bearing out this prediction—that it is possible, given the variety of additional resources that we have placed at their disposal, that on the average, the average administrative law judge could achieve a disposition rate of something in the range of 40 to 45 cases per month.

In fact, as I testified, during the month of March, over 300 of our administrative law judges did dispose of 40 or more cases a month.

Senator **Cohen**. I have a document which says, "OHA initiatives and objectives." Item No. 4 on this particular document says, "Achieve a disposition rate of 40 per month per judge by September 1982, 45 per month per judge by September 1983."

Now, what does that mean?

Mr. **Hays**. I do not know specifically what that document is. But as I stated, I have what, in effect, is my personal goal, my personal expectation, that on the average our administrative law judges will accomplish levels in that range. I have further——

Senator **Cohen**. Wait a minute. What do you mean, your personal goals? Where did you get these personal goals? Did you check with the administrative law judges?

Mr. **Hays**. Yes, as a matter of fact.

Senator **Cohen**. And they thought they could double their caseload?

Mr. **Hays**. Given the fact that we were making substantial increases in the support staff to assist the administrative law judges; given the fact that we were doing such things as for the first time providing state-of-the-art word-processing equipment for all of our hearing offices; given those sorts of initiatives, given more resources to administrative law judges; all of those things together with the other important ingredient of the motivation and professionalism of the administrative law judges, we thought those sorts of results could be achieved. And, in fact, we are seeing results such as that.

I have further stated publicly that, in my opinion, it is very difficult to envision ever seeing an average disposition rate for our corps of administrative law judges go beyond the 40 to 45 level, and that if the number of hearing receipts continues to increase and if the number of pending cases continues to increase, then the only solution will be to hire additional administrative law judges and additional support staff.

Senator **Cohen**. Do they have to crank out about two a day?

Mr. **Hays**. No, they do not have to do anything.

Senator **Cohen**. If they are going to hit 45, how many working days have you got?

Mr. **Hays**. The average month has 20 to 21 working days. So the average administrative law judge, supported on the average by close to somewhere between four to five support staff, including staff attorneys, can in fact—do in fact—dispose of something close to 40 cases a month. This is the national average. That is what our average administrative law judge is achieving today.

Now, with respect to the second question, again as I have testified, we do review ALJ decisions which deny benefits. In fact, we review far more administrative law judge decisions that deny benfits than we do ALJ decisions which pay benefits. Far more.

Senator **Cohen**. Who initiates that review?

Mr. **Hays**. At the present time, in virtually every case, it is the claimant. In fact, 50 percent or more of the claimants exercise their right to request review of the administrative law judge's decision.

Senator COHEN. Let me ask you: If an administrative law decision is in favor of disability, does that go to the Council? Does the Council on its own motion then review that?

Mr. HAYS. As I testified, we currently review approximately 15 percent of all administrative law judge favorable decisions.

Senator COHEN. Favorable. Do you review on your own-motion unfavorable decisions by the administrative law judge?

Mr. HAYS. At the moment we do not. What we are currently attempting to do is to discover whether we have any administrative law judges who have error rates, if you will, in denial decisons which would seem to warrant exercising our own-motion review authority over their decisions.

Senator COHEN. How do you know their error rates in denial decisions?

Mr. HAYS. By seeing what happens to their denial decisions when they are reviewed by the Appeals Council. We know that the average rate at which the Appeals Council finds problems in ALJ denial decisions sufficient to warrant either reversing or remanding those decisions is significantly less than the rate at which the Appeals Council finds problems in administrative law judge allowance decisions.

What we do not know yet, because of the problems with the computers in the Social Security Administration, is within that average whether any individual administrative law judges have a serious problem of decisional quality in their denial decisions.

We hope to have that data soon. If we discover that we have any administrative law judge who has a problem with his denial decisions, we will place that individual under review, and we will exercise our own motion review authority over that administrative law judge.

Senator COHEN. I think you made a statement that the ALJ's with high allowable rates are more decisionally defective than those with decision rates below the national average. How did you come to that conclusion?

Mr. HAYS. We came to that assessment in two ways. First was the Bellmon study that I referred to, which was a review of 3,600 ALJ decisions, and that study found that those administrative law judges with higher than average allowance rates had a greater probability of defect or error in their decisions than administrative law judges with either average or below average allowance rates.

More significantly, the actual live results of the ongoing Bellmon review itself have confirmed that the administrative law judges who were initially selected for Bellmon review on the basis of unusually high allowance rates in fact had a higher error rate, if you will, in their decisions than, for example, the national random sample of cases, which reviews cases of all, administrative law judges.

So, in fact, the results of our ongoing review process have, unfortunately, confirmed that, on the average, higher than average allowance rate administrative law judges have a higher probability of error in their decisions.

Senator COHEN. That study has been done by the SSA?

Mr. HAYS. That's not just the study. That's the results of the actual own-motion review of the Appeals Council.

Senator COHEN. Would you make that available to us for the record?

Mr. HAYS. I would be glad to, yes.[1]

Senator COHEN. You see, I have a little bit of a problem where the Appeals Council initiates review of decisions that grant disability but doesn't initiate review of any of those that don't. There seems to be a little bit of a bias there in terms of trying to look at those particular cases to find out whether they are decisionally defective.

Mr. HAYS. But, Mr. Chairman, that same Appeals Council, using the same criteria for reviewing cases, also reviews a significantly greater number of ALJ denial decisions.

Senator COHEN. Only because the claimant pursues it that far. If they pursue it that far.

Mr. HAYS. Yes. At this time, that is correct. But over 50 percent of the claimants do, in fact, pursue it, so what that means is that the average administrative law judges in fact has a much higher chance of having his denial decision reviewed by the Appeals Council than his allowance decision.

Senator COHEN. What is the reversal rate of the Council of the ALJ's on the disability claims?

Mr. HAYS. Well, the rate by which—are you asking for a cumulative——

Senator COHEN. We have been told, for example, that about 50 percent of the case denials were appealed at the State level and 60 percent of those cases are reversed by ALJ's. Sixty percent of that 50 percent is reversed.

What kind of comparable figures do you have in terms of the Council reversing decisions? I guess that would be the question.

Mr. HAYS. Unfortunately, it's difficult to simply answer your question. But let me answer it the best I can. First of all, for those cases that go before the Appeals Council involving unfavorable or denial decisions, it's roughly in the neighborhood of 10 percent of the cases that the Appeals Council exercises its authority over and does something to the decision.

Senator COHEN. That's a case where if the claimant appeals all the way to the council, presumably, benefits have been terminated. Ten percent of the cases that go that far are in fact reversed or reinstated?

Mr. HAYS. That's a complication there. Ten percent are not, in fact, reversed. The Appeals Council exercises its authority in about 10 percent of those cases. Some of those cases, or many, the majority of those cases, in fact, are merely remanded—returned to the administrative law judge, with instructions to develop the case further, obtain further evidence, hold another hearing.

Senator COHEN. What happens to those cases?

Mr. HAYS. In many of those, the ultimate result, in fact, is not changed. That's why it's difficult to say what the actual reversal rate is for those decisions. Probably not more than 5 percent of those decisions are actually changed.

Senator COHEN. Let me just simplify it at this point. If a claimant is denied benefits, the claimant requests reconsideration by the

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[1] See p. 200–207.

State examiner, then goes to the ALJ, and finally appeals to the Council. The Appeals Council has a very low reversal rate or modification of the denial, and in fact, let's say, 5 percent of those cases ever change from the initial claims examiner's determination.

Mr. HAYS. On the average, the administrative law judge denial decisions are very accurate. In terms of the allowance decisions, the favorable decisions, the rate by which the Council takes jurisdiction over the case and takes some further action is higher than with denial decisions.

Senator COHEN. About 15 percent of the cases are reviewed by the Council on its own motion. So, in other words, the Council reviews about 15 percent of the allowance cases, and there is about a 60-percent ALJ reversal rate from the State claims examiners. You have a 60-percent reversal rate, and 15 percent of those cases are then reviewed?

Mr. HAYS. Well, first of all, the average administrative law judge allowance rate is in fact approximately 50 percent. Of those cases, roughly 15 percent are reviewed to see whether the Appeals Council is or is not in fact going to disturb the decision.

Of the cases that are so reviewed, somewhere between 15 to 20 percent are in fact disturbed, if you will, taken for own motion by the Appeals Council, and then, generally speaking, one of two things happens: Either the case is remanded to the administrative law judge, again, generally for some further developments—gathering additional evidence, holding a hearing—or is reversed on the record by the Appeals Council.

Senator COHEN. Fifteen percent, you said?

Mr. HAYS. Slightly higher, but it is somewhere between 15 and 20 percent. The number changes.

Senator COHEN. What happens to those cases that are remanded?

Mr. HAYS. In most cases, there is another hearing held, and in some cases the administrative law judge issues another favorable decision. And sometimes the administrative law judge, as a result of the additional evidence, issues an unfavorable decision.

Senator COHEN. Do you keep records of that?

Mr. HAYS. We are trying to. And I'm sorry, I do not have them on the tip of my tongue.

Senator COHEN. What I am really trying to find out is how do you determine that the Council has concluded that those cases in which there has been a higher reversal rate of the State examiners have more errors? How do you know that?

Mr. HAYS. Two things. First, on the average——

Senator COHEN. You keep telling me averages. I am asking you for facts, and you say, "Well, we really don't have them, the numbers, the statistics."

Mr. HAYS. First of all, it is a fact that there are fewer errors, fewer problems, found in ALJ denial decisions than there are in ALJ allowance decisions.

Senator COHEN. Tell me how you know that.

Mr. HAYS. Because the Appeals Council is forced to exercise its jurisdiction to change ALJ denial decisions, on a percentage basis, far less often than in ALJ allowance decisions.

Senator COHEN. It's not forced to exercise its decision at all, unless there is a denial. They don't have to do anything.

Mr. HAYS. You're talking about those cases that come before the Appeals Council, whether by appeal of the claimant or on the motion of the Appeals Council.

Senator COHEN. But the Council only takes jurisdiction, its own motion, where it's a favorable case. It doesn't do it on an unfavorable case.

Mr. HAYS. Mr. Chairman——

Senator COHEN. I just want to know how you come up with the statistical information so you can say that on an average there is a greater probability of error when there has been an award of disability than when there has been a denial.

Mr. HAYS. Because the rate of error, if you will, is, in fact, much higher on denial decisions than on favorable decisions.

Senator COHEN. That's just the opposite of what you told me before.

Mr. HAYS. I'm sorry. My apologies. The so-called error rate on denial decisions is far lower than the so-called error rate on allowance decisions.

Senator COHEN. Tell me how you reached that conclusion. I asked you the question of what happens when the Council looks at a case on its own motion, to see whether there's been error committed, many times remanding it to the ALJ, sometimes issuing its own automatic reversal of the decision, saying an error of law has been made. But you don't have any recordkeeping of these actions. How do you know that?

Mr. HAYS. I would be happy to submit for the record——

Senator COHEN. Where are you going to get that information? Where do you get the statistics?

Mr. HAYS. From the records of Appeals Council actions.

Senator COHEN. You told me you didn't have them. They don't keep the records.

Mr. HAYS. I'm sorry, sir, but what I tried to explain was that what we are having difficulty in collecting from the antiquated computer system is information on what happens with an individual adminstrative law judge's denial decision that is being reviewed by the Appeals Council.

Cumulatively, we have the data as to what happens before the Appeals Council with all of the cases that come before it.

Senator COHEN. So you don't have the records as far as what happens to a case when disability has been denied? But you do have the information on those in which disability has been granted and the Council then exercises on its own motion a review of the 15 percent of allowances; you do have that information?

Mr. HAYS. What I do not have is the individual percentages for each administrative law judge of how many of their denial decisions are in fact taken by the Appeals Council. That is what I do not have.

I could tell you that on the average, for all administrative law judges, it's approximately 10 percent. What I cannot tell you today—I hope I will be able to tell you soon—is with respect to individual ALJ, X, or Y, what his particular percentage might be within the Appeals Council.

Senator COHEN. Mr. Friedenberg, you were kind of shaking your head before.

Mr. **Friedenberg**. Let me just add, having been part of the Appeals Council operation at one time, and also an administrative law judge, we can tell you specifically the percentage of cases in which the Appeals Council grants review. We can't tell you the actual percentage of the outcome of those cases. That is the data we don't have—if, in fact, they're remanded back to the administrative law judge.

We can also tell you the percentage of cases that the Appeals Council reviews on its own motion. But we can't tell you the percentage of cases that are ultimately allowed or denied if in fact they are remanded, and not reversed by the Appeals Council.

The criteria that the Appeals Council uses in either granting review or reviewing on its own motion are the same. They use the same criteria, in exercising either their own-motion authority or their authority to grant review.

Senator **Cohen**. But in one case it depends upon how many claimants exercise their right of appeal. If the case is denied, and automatically the claimant appeals it, the Council's jurisdiction has to be involved. In the other case, the Council reviews the case at its own discretion. The question I have, if you don't know what's happened to those cases on remand, reconsideration, reaffirmation, I still don't know how it is you come to the conclusion that greater error has been made in those cases in which disability has been awarded than when disability has been denied. I don't understand the basis for such a conclusion.

Mr. **Friedenberg**. As I indicated, the Appeals Council applies the same criteria in deciding whether to grant review or to review on its own motion. It is on that basis that the error rate is determined. In effect, the own-motion rate or the grant-review rate is, in fact, the error rate.

Senator **Cohen**. But it may not be an error. In other words, it may not be an error as far as the ALJ is concerned. He made a decision. The Council decides to review it, and it may reaffirm it. That doesn't determine whether it's right.

Mr. **Friedenberg**. Well, it was wrong at the time he issued that decision.

Senator **Cohen**. How do you know it was wrong?

Mr. **Friedenberg**. The Appeals Council found on the basis of its review that the administrative law judge did not have substantial evidence to support that decision or he committed some other type of error of law, and, in fact, now has remanded that case, for example, to correct that error and get the additional evidence that he should have had to make that decision.

Senator **Cohen**. In those cases, you have a 15-percent figure, right? In those cases?

Mr. **Friedenberg**. We have approximately a 10-percent figure on the denied cases, and approximately a 15- or better-percent figure on the allowed cases.

Senator **Cohen**. The only way you have of determining accuracy in the denial cases is if the claimant appeals the decision.

Mr. **Friedenberg**. That's correct.

Senator **Cohen**. So, if they don't appeal it, you could have a much wider discrepancy in terms of accuracy of the decision. If more people appeal, if you had more people appealing, then you would have a greater chance, statistically, of finding reversible error or remanding it for another hearing by the ALJ, wouldn't you?

Mr. **Hays**. The results are to the contrary. Keep in mind that in fiscal year 1982 there were approximately 65,000 denial decisions reviewed, and approximately only 12,000 favorable decisions reviewed. Even though we reviewed far greater denial decisions, in fact, there were fewer problems in the denial decisions.

But the thing that concerns me, Mr. Chairman, is I do not want to give this committee the impression that I am testifying to the effect that we have a significant problem of error or poor quality in the decisions of the average administrative law judge. I certainly do not want to give that impression.

Senator **Cohen**. I am going to yield to Senator Levin, but I will just make one point. We will hear about the qualifications of the administrative law judges, but I recall—and, Senator Levin, correct me if I am wrong—at the first hearing we had, there was some suggestion that the State claims examiners were more qualified to deal with the issues than administrative law judges who were not as well versed in the day-to-day dealing with disability claims as were State examiners.

And what you are saying is that simply isn't true, that the administrative law judges are more competent to deal with the issues involving termination of disability than the State examiners, I assume.

Mr. **Hays**. My recollection, Mr. Chairman, of that discussion at the previous hearing was that it was centered around the amount of specific disability training, such as in the medical aspects of disability, that was received by State agency examiners in comparison to administrative law judges.

I don't think that anyone from the Social Security Administration intended to even imply that the average disability examiner was more highly qualified than an administrative law judge.

Senator **Cohen**. Let me cut behind all of the testimony, and I'll tell you what is essentially at the heart of this. There is a sentiment, if not expressed at least felt, that what we have is a bunch of liberal administrative law judges appointed over the years who are simply awarding these claims without really taking a close look, and now the time has come to stop that practice, and we're going to tighten up by cutting out certain factors to be considered.

We're going to have a review of those cases, we're going to try and discipline those individuals who are applying the rule of the court as opposed to the rule of the agency. We've been kind of wasteful along the way; now it's the time to stop that practice.

That hasn't been expressed, but I can tell you, that's what has come through during the past year.

But I yield to Senator Levin; you've been most patient.

Senator **Levin**. It's been very useful. Thank you, Mr. Chairman.

I want to use some words here and make sure we don't have a semantics problem for the next few minutes. You used the words "high-reversal rate" to mean more allowances.

Mr. **Hays**. I hope I didn't use the term "high-reversal rate." I may have said high-allowance rate.

Senator LEVIN. Isn't a high-allowance rate the same as a high-reversal rate?

Mr. HAYS. The term "reversal" is really a misnomer, Senator, because the administrative law judge process is a de novo process.

Senator LEVIN. I want to get to what you mean by certain words. In your own memorandum, when you talk about a high-reversal rate, I gather, you're talking about more allowances by the ALJ's?

Mr. HAYS. Again, I hope I never referred in any document, internal or external, to high-reversal rates. However, that usually is the common term that's applied.

Senator LEVIN. How about a low-reversal rate? Do you ever use that term in your internal memoranda?

Mr. HAYS. I believe I have seen reference to the term "low-reversal" or "low-allowance" rate.

Senator LEVIN. And a lower reversal rate then would be synonymous with more denials?

Mr. HAYS. Again, allowance means paying cases, granting benefits; denial meaning to deny benefits.

Senator LEVIN. And when we say that an ALJ has a low-reversal rate, that means there are more denials from that ALJ?

Mr. HAYS. Yes, I would say generally that's correct.

Senator LEVIN. Now, let's look at your testimony on page 3, when you say there was a higher probability of error in favorable decisions of ALJ's with high overall allowance rates—that is what you and Senator Cohen have been talking about in part this morning. A number of times you weren't quite clear in your testimony this morning. In response to a number of questions you would just simply say "there's a higher probability of error in the decisions of ALJs with high overall allowance rates." You didn't mean that. You meant what your written testimony says, I gather? That is, your information indicates that there is a higher probability of error in the favorable decisions of ALJ's with higher overall allowance rates, because your antiquated equipment hasn't been able to tell us about the probability of error in unfavorable decisions of ALJ's. Is that correct?

Mr. HAYS. What this statement says, and I believe what I testified to verbally, was that both the Bellmon study that is referred to on page 3 of my statement and the ongoing Bellmon own-motion review have indicated that administrative law judges with unusually high-allowance rates do have a greater likelihood of error in those allowance decisions.

Senator LEVIN. Only in the favorable decisions. That's what you said on page 3, right?

Mr. HAYS. Yes, that's right.

Senator LEVIN. Your antiquated equipment has not yet been able to tell us whether that's true of what you would call their unfavorable decisions or denials.

Mr. HAYS. With respect to an individual administrative law judge, that is unfortunately the case.

Senator LEVIN. It's unfortunate that your antiquated equipment could analyze judge-by-judge who has a higher error rate relative to what you call the favorable decisions, or the allowances, but your same antiquated equipment can't give us a judge-by-judge analysis relative to the denial of ALJ's.

Why is your equipment so antiquated that we can't get the analysis relative to denials, but can only get analysis relative to allowances?

Mr. HAYS. Basically because we had to be able to capture the data with respect to allowance decisions in order to comply with the Bellmon amendment requirements.

Senator LEVIN. So you think Bellmon only related to allowance decisions?

Mr. HAYS. That's correct. I do.

Senator LEVIN. I read that legislative history. That is not what Bellmon says. Bellmon does not instruct you to look at allowance decisions by ALJ's; it tells you to look at decisions by ALJ's.

Mr. HAYS. I just have to respectively say that it's been our interpretation of the entire legislative history, including the personal remarks of Senator Bellmon that, in fact, that was the intent of Congress, given the fact that the real reason for enacting the Bellmon amendment was that for a period of approximately 7 years prior to its enactment, the Social Security Administration had not exercised its own-motion review authority over favorable decisions, and only unfavorable decisions were subject to any further administrative or judicial review.

That really was the whole reason for the Bellmon amendment, to begin reviewing once again a certain number of favorable decisions.

Mr. GONYA. Senator Levin, if I might add, I, too, have read that legislative history and concur with Mr. Hays.

As I recall the statements that Senator Bellmon made when introducing that legislation coupled with an exchange of correspondence that he had with Senator Dole, in our judgment evidenced very clearly that what Senator Bellmon was most interested in—and the objective of that legislation—was to deal with allowance decisions.

Senator LEVIN. Not with the reversal rate? Not with the discrepancy between State decisions and ALJ's, but with the high-allowance rate of ALJ's; that's what you're saying?

Mr. GONYA. And the errors that were occurring, at least in Senator Bellmon's mind, in the decisions that ended up in granting awards.

Senator LEVIN. I've gone over that legislative history. All references to the type of judges who would be reviewed in the Bellmon review were deleted when that matter came out of conference.

The Senate bill talked about allowance rates; it was deleted when it came out of conference, and I think this may be the heart of the problem, because if you think that Bellmon only wanted you to look at errors on the part of high-allowance judges, it seems to me you're following an erroneous interpretation of congressional intent.

We want to get at error. We're interested in error, not just error on the part of so-called high-allowance judges, but error on the part of ALJ's or the State examiners regardless of whether they have a high- or low-allowance rate.

It seems to me that goes to the heart of the problem. I would think that we're going to have to get at that, perhaps legislatively.

But now, in any event, your equipment you think will be able to give you an analysis of the high-denial judges; is that right?

You're looking at that, despite the absence of any legislative mandate to do that, I presume?

Mr. HAYS. That's correct.

Senator LEVIN. You're just doing that on your own?

Mr. HAYS. Yes.

Senator LEVIN. My question, though, comes back—you pointed to the antiquated equipment as making it impossible for you to look at the high-denial judges.

Again, why was your equipment modern enough that you could look at the high-allowance judges but not at the high-denial judges, judge by judge?

I'm talking about a judge-by-judge analysis, not an average, just judge by judge. Why was your equipment modern enough for the analysis of the high-allowance judges but too antiquated to look at the high-denial judges?

Mr. HAYS. The problem, Senator, is one of programing the computer to extract certain information that's contained in the larger data base, and those programing changes with respect to favorable decisions and administrative law judges under the Bellmon review were made early on because we had to implement the Bellmon amendment. And when we decided that we wanted to attempt to identify individual rates with respect to denial decisions, we ran up against the perennial problem of how long it takes to make a programing change in the SSA computer system.

Senator LEVIN. It's not antiquation, it's just that you got to one first.

Mr. HAYS. In order to implement the Bellmon amendment, we requested and got the changes made to the system in order to be able to implement it on October 1, 1981.

Senator LEVIN. So you got to the high-allowance judge analysis first.

Mr. HAYS. Because we were implementing the requirements of the law.

Senator LEVIN. You say you were mandated by Congress, I say you weren't. I say you were mandated to look at errors and look at the difference between the State and the ALJ's.

I think that the legislative history, particularly the fact that any reference made to the allowance rate of judges to be reviewed under Bellmon was deleted by the conference, supports this interpretation.

I think legislative history is in opposition to your interpretation, but I'm not going to argue with you about that. Because of legislative history or whatever you decided to look at the high-allowance judges first, judge-by-judge, and you haven't yet finished your analysis of the high-denial judges. It has nothing to do with the antiquation of equipment, it has to do with which one you did first for whatever reason.

Mr. HAYS. If our equipment were adequate, I would have received the information essentially upon requesting it, which was, as I recall, in early January

Senator LEVIN. Now, would you like to see a shift to a lower—let me put in in a different way. Would you like to see a shift to more denials?

Mr. HAYS. No, I would not.

Senator LEVIN. A memorandum which was dated June 29, 1982, subject: Individual ALJ Reversal Rates, a memorandum from Mr. Ives, who is the Acting Director of the Office of Management Coordination at HHS, to you. Mr. Ives said that "What we would like to see is a decrease in the variance of ALJ reversal rates"—so far so good, probably—I think we're all probably interested in uniformity, if possible, so that whether one gets a benefit or not doesn't depend on what ALJ you happen to get—so far so good.

But then the memo goes on—"as well as a shift to lower reversal rates," and then finishes the sentence indicating that that will provide uniformity within the SSA process.

Again, no problem with uniformity. Here's the Acting Director of the Office of Management Coordination saying—in a memo to you—that he would like to see a shift to lower reversal rates. You just said you do not necessarily favor a shift to lower reversal rates.

Mr. HAYS. If I recall the concluding part of that memorandum which you read, he said in the overall SSA process or context of the overall process. One of the concerns that we have, and one of the concerns that was expressed by Secretary Heckler yesterday, is the fact that many cases now have to go all the way to the administrative law judge level before they can be properly addressed.

And so in the sense that we would like to see the process improved and changed so that preferably most decisions could be made correctly at the initial level, most incorrect decisions that are made at the initial level could be corrected at the first appeals process, and fewer cases would have to come to the administrative law judge level.

We would all look forward to a lower allowance rate at the administrative law judge level.

Senator LEVIN. Let me just go back to what you said. Do you consider that a trend to a lower reversal rate—which means more denials—we've established that at the beginning of our questions—to be a more favorable trend?

Mr. HAYS. It could be a favorable trend.

Senator LEVIN. Could it be an unfavorable trend?

Mr. HAYS. It certainly could indicate that more cases are being properly handled at lower levels of adjudication.

Senator LEVIN. Could it be an unfavorable trend?

Mr. HAYS. I suppose it could be.

Senator LEVIN. We don't know whether it's favorable or unfavorable. It may or may not be in and of itself. We can't determine that it's a favorable trend; would you agree with that?

Mr. HAYS. I think it depends on the quality and accuracy of those decisions. If those decisions that go into an increasing or decreasing allowance rate are accurate, correct decisions, then it's a good trend. If the decisions are not accurate and of good quality, then it's a bad trend.

Senator Levin. So, in and of itself, the trend to lower reversal rates, which means more denials by ALJ's, is not a favorable trend; you'd have to look behind it.

Mr. Hays. Looking solely at an allowance rate tells you very little.

Senator Levin. Yet, in that very same memo from Mr. Ives to you, the following language appears:

> The results in the second quarter of 1982 were much more favorable. While there was not a decrease in the variance among reversal rates—we still have the lack of uniformity—the general trend was to lower reversal rates.

Here is the Acting Director of the Office of Management Coordination telling you that even though we still have as much diversity and there is still an absence of uniformity—we have not gained anything in that area—that the results were much more favorable because the general trend was to lower reversal rates, which means more denials.

I will tell you something, that is unmistakably clear in light of your testimony and in light of the facts. Nobody can say whether there is better quality or lower quality at the State level. And unless you know that, the fact that there is a lower reversal rate does not tell us a darned thing.

You admitted that this morning. And yet we have the Acting Director of the Office of Management Coordination telling you that the trends are much more favorable, the results are much more favorable because even though there is still little uniformity, the general trend is to more denials.

I will tell you, that memo says it all to me. A lot of other things say it all to me too. So I guess this does not quite say it all, but that says plenty to me as to exactly what is happening.

There are other things which indicate the same thing. As you have indicated, you have your macro analysis, your average analysis for the favorable decisions and unfavorable decisions, the allowances, the denials. And you have said in the case of the allowances you know the error rate judge-by-judge. However, you do not yet have the same information on the denials; you will get that information later; that analysis is not quite finished yet. But you do have judge by judge the error rate relative to allowances, and you can tell whether or not there is a higher rate among the high-allowance judges than there is among the low-allowance judges. And you have told us this morning that there is a higher average error rate among the high-allowance judges, the more liberal judges, as our chairman I think aptly characterized them, than there is among the more strict judges.

Now, when it came to the Bellmon review issue, you put all the high-allowance judges under Bellmon review, did you not?

Mr. Hays. Initially we did put them as a group under review, yes, sir.

Senator Levin. You did not just put the high-error rate judges under Bellmon review?

Mr. Hays. At that time, unlike today, we had no way of measuring the so-called error rate of those individuals beyond the average finding, if you will, from the Bellmon study.

Senator LEVIN. And when you did find out the error rate judge by judge—we are only talking now about cases where the benefits were granted—you then immediately removed from Bellmon review all those judges who had been on it, who had a low error rate?

Mr. HAYS. Yes. Once we had enough information to give us good data about the actual own-motion rates of those administrative law judges, we did, in fact, remove them. And I believe I testified to the effect that we have removed about 44 individual judges from the Bellmon review.

Senator LEVIN. Out of how many that were put on?

Mr. HAYS. About—the exact number escapes me, but approximately 100 to 110, something in that range.

Senator LEVIN. Just so we are very clear, your first instinct as soon as you had the average, and you could draw a correlation on the high-allowance judges, was to put them all on review, not to wait until you had the individual error rates before you reached that conclusion? Right?

Mr. HAYS. We had to start somewhere, and we acted both on our interpretation of congressional intent and on the findings of the Bellmon report and started in that way. And within a period of about 6 months, of course, as I testified, we greatly expanded the review and added such things as the national random sample of all administrative law judges.

Senator LEVIN. Did you believe the congressional intent was also clear; that you were told by Congress to put all of the high-allowances judges on Bellmon review, although you were able to determine the average error rate of judges? Do you think that was the congressional intent?

Mr. HAYS. We thought that one of the driving forces, if you will, behind the Bellmon amendment was the concern about unusually high-allowance rates with some administrative law judges.

Senator LEVIN. My question is: Did you believe that Congress mandated you to put all high-allowance judges on Bellmon review before you knew their individual error rate?

Mr. HAYS. No. I did not testify to that.

Senator LEVIN. You did not mean to suggest that?

Mr. HAYS. I did not mean to suggest that Congress mandated putting all high-allowance rate ALJ's under review.

Senator LEVIN. But you did.

Mr. HAYS. We put the highest allowance rate judges under review.

Senator LEVIN. Before you knew what their individual error rates were?

Mr. HAYS. That is correct.

Senator LEVIN. That message is mighty clear, I am afraid, too.

The last question that I have, Mr. Chairman, is the following: You have another memo which is dated October 4, 1982, from the Associate Commissioner of the Office of Hearings and Appeals to the regional chief administrative law judges.[1]

By the way Mr. Chairman, I would like both these memos to be made a part of the record.

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[1] See p. 200.

You are talking here about a feedback—and when I say "you," I am not talking about you personally, because I do not know who the Associate Commissioner of the Office of Hearings and Appeals—oh, yes, I do. It is you personally. That is your title. [Laughter.]

I am getting personal here. I do not mean to. But at any rate, you wrote the memo. Was the memo entitled "Implementation of Feedback Process on OHA's Ongoing Bellmon Review" circulated to the regional chief administrative law judges? Do you remember that memo?

Mr. HAYS. Generally speaking, yes.

Senator LEVIN. Was that circulated? Do you remember?

Mr. HAYS. It was addressed to the regional chief administrative law judges. I can only assume it was sent to them. I hope it was.

Senator LEVIN. You said the following:

> I therefore authorize the establishment of a feedback system. The purpose of the system is to relay Bellmon review information back to the ALJ's to improve their adjudicative performance. Under the first stage of the feedback system the chief administrative law judge will send a memorandum to you enclosing a brief outline of particular problems found in the decision of an ALJ. Also enclosed will be summaries of several cases reviewed by the Appeals Council on its own motion with supporting documentation. You will be asked, together with the Deputy Chief Administrative Law Judge Irwin Friedenberg on occasion to meet with the ALJ involved to discuss the problems reported and review steps that could be taken to improve the accuracy of his or her decisions. I cannot stress the importance of these counseling sessions. They represent the principal means for constructive contacts with ALJ's on the subject.

Which ALJ's were to be so counseled? Where they the ones who had the high-allowance rates and that were on Bellmon review because of those rates?

Mr. HAYS. It could include, but not be limited to, that group; yes.

Senator LEVIN. So you set about counseling ALJ's who had the highest allowance rates among others?

Mr. HAYS. Any administrative law judge under the Bellmon review process.

Senator LEVIN. But part of that group were the highest allowance ALJ's?

Mr. HAYS. Yes.

Senator LEVIN. They were going to be counseled, right?

Mr. HAYS. Yes.

Senator LEVIN. Regardless of their individual error rate?

Mr. HAYS. No.

Senator LEVIN. By that time you had the individual error rates?

Mr. HAYS. That is correct.

Senator LEVIN. So by that time you had removed from Bellmon review all the high-allowance judges who did not have high error rates?

Mr. HAYS. Yes. That is essentially correct. And the so-called counseling or feedback program was designed to to first to those administrative law judges with the highest own-motion rates totally withour regard to allowance rates.

Senator LEVIN. I understand that, but I want to be real clear on timing. When you sent that memo in October 1982, all of the high-allowance judges, as you put it, who had been on Bellmon review because of their allowances, because of the fact they were part of a class that had a statistical correlation to error, all of those who had a lower error rate even though they were high-allowance judges had been removed from Bellmon review?

Mr. Hays. As of that specific date, no. This is a continuing process by which we remove administrative law judges from review.

Senator Levin. There were still in the Bellmon review process administrative law judges who were being reviewed only because they had a high allowance rate regardless of their individual error rate? Right?

Mr. Hays. There are still under review administrative law judges who were initially selected for review because of their allowance rates.

Senator Levin. Regardless of their error rate?

Mr. Hays. Only those administrative law judges that have relatively high error rates, if you will, are still under review today.

Senator Levin. I am not asking you that question. I know that because I know what you told me today in your testimony. I am saying in October 1982 when you counseled administrative law judges for various reasons, one of the reasons——

Mr. Hays. We did not counsel administrative law judges in October 1982.

Senator Levin. There was a memo here.

Mr. Hays. We announced our intention to have such a program.

Senator Levin. When you announced your intention to counsel administrative law judges because of many reasons. But if they were in the Bellmon review process, one of the reasons that they were in that process could be because of their high-allowance rates, is that right? I know they were in the Bellmon process for lots of other reasons: They were new judges and all the rest.

Mr. Hays. That is not what my "but" goes to.

Senator Levin. Let me finish my question. One of the reasons they could be on the Bellmon review, and indeed were, was that the highest allowance judges were given Bellmon reviews, weren't they?

Mr. Hays. Yes.

Senator Levin. And in October 1982 you expressed an intention to counsel all Bellmon review judges, right?

Mr. Hays. I cannot recall the specific language. I do not know that we said we were going to counsel all Bellmon review judges.

Senator Levin. In any event, to get down to the chronology, when this memo was sent on October 4, 1982, expressing an intention to counsel the judges who were in the Bellmon review process, some of those judges on October 4, 1982, were there only because they were high-allowance judges?

Mr. Hays. I cannot recall. I do not know at this moment how many judges had been removed for review as of October 1982.

Senator Levin. Mr. Hays, I did not say "How many?" I said some of the judges under Bellmon review in October 1982, when this memo was written, were there only because they were high-allowance judges, is that not true?

Mr. Hays. They had been selected for review only because they were high-allowance rate judges; yes.

Senator Levin. Some of them were still there in October 1982 for that reason and that reason alone. Is that not right? Some of them were there in October 1982 for that reason and that reason alone. Is that not right?

Mr. HAYS. So far as I can recall, by October 1982 we had not yet been able to identify all administrative law judges on review who had low own-motion rates and who had subsequently been removed from review.

Senator LEVIN. So the answer to my question directly, some of the judges in October 1982 were still on Bellmon review solely because of their high-allowance rates?

Mr. HAYS. I would have to just repeat my previous answer, Senator.

Senator LEVIN. Why can't you give me a direct answer to that question? It is a very straightforward question. I cannot state it any more clearly. I have worked on it all night. [Laughter.]

Some of the judges who were on Bellmon review in October 1982 were there solely because of their high-allowance rates.

Mr. HAYS. They certainly had been selected solely on the basis of their high-allowance rates.

Senator LEVIN. And were still on Bellmon review in October 1982. Right?

Mr. HAYS. I cannot testify to that.

Senator LEVIN. Some were still being reviewed under the Bellmon process of October 1982 solely because of their high rates. You cannot say that here?

Mr. HAYS. I cannot say whether, as of October 1982, we had yet been able to identify the own-motion rates of all of those judges and make decisions as to whether some of them should consequently be removed.

Senator LEVIN. We would ask then for the record, Mr. Chairman, that you do tell us which judges on October 4, 1982, were there solely because of their high-allowance rates and as to whether or not, as of the date of that memo, which I ask be made part of the record, they had been identified as having high error rates.[1]

Thank you very much.

I may have additional questions for the record, too.

Senator COHEN. I have a number of additional questions as well. But we have two more panels of witnesses to go forward with.

What has become clear, Mr. Hays, is that we are trying to determine "intent." You have expressed a determination to follow the intent of Congress. Senator Levin disagrees with your interpretation of what our congressional intent was. We have been asked to review what the intent of the Social Security Administration is. Is it the intent of the adminstration to have a chilling impact, to in some way intimidate or at least try and move ALJ's in a certain direction; that is, toward more denials rather than fewer denials?

Two things strike me from the testimony today. One is the emphasis that you yourself have placed upon efficiency, greater efficiency. Let us increase the production rate to 40 by September 1982, 45 by next year, and that is something the ALJ's can handle adequately.

You have also said in response to Senator Levin's questions that you would hope you could cut down the need to appeal all the way to the ALJ stage. All the way to the ALJ stage is not that far. You have the initial State decision. You have the reconsideration stage, which we have found from previous hearings is nothing more than a rubber stamp of the case below. I think it is 85 percent of all those cases that are reconsidered are simply reaffirmed.

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[1] See p. 200.

Finally, appealing to the ALJ, which can take anywhere from 1 year to 15 to 18 months. So the effort is to try to compress that down now to retard those appeals to the ALJ and dispose of them at a lower level.

One of the difficulties is how the appeals process is to operate. Let me just read this to you. What you have supported is an evidentiary hearing at the reconsideration stage. Senator Levin and I want to abolish the reconsideration stage. We think it is meaningless. It's a rubber stamp. It's a relatively time-consuming process that doesn't produce very much in the way of positive results. What you would like is to have a reconsideration stage hearing. Here is what the proposal is from an SSA memo on what's going to take place in that evidentiary hearing.

> Hearing officers will conduct four to five hearings per day. On average, 20 minutes will be allowed for the hearing officer to review the file. The hearing will take 30 to 45 minutes and 20 to 25 minutes will be allotted for the preparation of a decision immediately after the hearing.

What you're doing is, you're compressing this process. We're going to accelerate the number of cases disposed at the ALJ stage. We're going to compress the evidentiary hearings down to the reconsideration stage, and we're going to crank these people through at a rate of 20 minutes a hearing.

I submit to you that what you're doing in terms of trying to achieve efficiency is, you're going to sacrifice quality of decisions, the very thing we're all saying we want.

We want to get high quality, but not at the expense of that kind of a "Stop it. I can't dance any faster."

Mr. HAYS. Will you allow me to report to you on the results of the pilot tests of this new evidentiary hearing process that have already been completed?

Senator COHEN. I can tell you from my own experience what it was like handling workmen's compensation cases at the State level. We took a heck of a lot longer than 20 minutes to dispose of a case. In fact, there is a judge here about to be considered by the Senate Judiciary Committee today that I used to do battle with during the course of those hearings, on a monthly basis. And let me tell you, we gave a lot more consideration to the detemination of whether someone is disabled than 20 minutes. If we didn't, I'd think something is wrong.

Mr. HAYS. Mr. Chairman, we have more than doubled the allowance rate in the cases that went through the pilot tests of this evidentiary hearing process.

Senator COHEN. Is that good or bad?

Mr. HAYS. We think we've made good decisions. What happened was that twice as many people received a favorable decision at that stage as otherwise would have, and within 60 days of the initial State agency determination, rather than having to wait an average of 180 days more to get a decision out of the administrative law judge level. So we think that's going to be a significant improvement. More people can get a better shot faster in this new face-to-face reconsideration process. And consequently, fewer people will have to wait before they get to the adminstrative law judge. That will have the effect of either slowing the growth or perhaps even reducing the caseload at the administrative law judge level.

Senator COHEN. You're getting twice as many favorable cases considered over what period of time?

Mr. HAYS. During the period of the pilot project, we had about 1,200 individuals that received a hearing using the procedures we have designed for national implementation. That project has lasted for a period of about 3 months. It just ended within the last couple of weeks. We have found that, in or opinion, it is a significant improvement. We think that when this new process is implemented, no one will accuse it of being a rubber stamp. We are fully aware of problems with the existing reconsideration process and we think we can give people a full fair shot quickly at a face-to-face reconsideration process.

Senator COHEN. If that's the case, we won't need ALJ's at all then, if you are going to be that successful.

Mr. HAYS. I seriously doubt that that will be the outcome.

Senator COHEN. Mr. Hays and Mr. Gonya, Mr. Friedenberg, thank you very much for coming this morning.

[Attachments to Mr. Hays' testimony follow:]

[Appendix I]

THE DISABILITY APPEALS PROCESS

The disability appeals process provides for three levels of administrative review after the initial determination. A claimant for Social Security disability benefits who is denied at the initial level, or who is determined after review to be no longer disabled, may request a reconsideration. This review is conducted by a different examiner than the one who made the initial determination. It is a de novo paper review of the evidentiary record, including any new evidence submitted by the claimant. Beginning in 1984, reconsiderations in disability benefit termination cases will include the opportunity for a face-to-face evidentiary hearing.

A claimant who disagrees with the reconsideration decision may request a hearing and appear personally before an ALJ. The ALJ may request the appearance of medical and vocational experts at the hearing and can require claimants to undergo consultative medical examinations. Claimants may submit additional evidence, produce witnesses, and be represented by legal counsel or lay persons. After the hearing, the ALJ issues a written decision, which can affirm, reverse or modify the previous administrative determinations.

A claimant who disagrees with the ALJ's decision may request review by SSA's Appeals Council. The Council may uphold, reverse, amend or remand the ALJ decision or it may deny the request. A decision by the Appeals Council is the final administrative decision on the claimant's case; however, a claimant who is still dissatisfied may seek judicial review.

[Appendix II]

ACTIONS TAKEN BY SSA TO SUPPORT ALJ'S IN MANAGING THE HEARING CASELOAD

SSA has hired additional ALJ's, bringing the current total to more than 800.

We hired 749 new supporting staff persons. This raised the overall support staff to ALJ ratio from 4.4:1 in fiscal year 1981 to 4.7:1 in fiscal year 1982. Our goal is to increase this to 5:1.

SSA opened three regional hearing offices that assist hearing offices within their regions that have the greatest backlogs. We opened a national office that provides the same service to the other regions. These offices allow greater flexibility and efficiency in handling temporary increases in workloads or shortages of ALJ's in particular offices.

We have upgraded the office equipment in our hearing offices to enable staff to perform case processing functions more expeditiously.

We are experimenting with innovative organizational structures and methods of processing the workload. We establish a Hearing Office Innovations Staff to investigate innovative procedures used in the field and analyze their suitability for nationwide implementation.

Senator COHEN. Our next witnesses are Charles Bono, Jacob Friedes, and Victor Rosenblum. Mr. Bono is president of the Association of Administrative Law Judges. He's testifying on behalf of that organization. Mr. Friedes is a recently retired administrative law judge from Buffalo. Finally, Mr. Rosenblum is a professor of administrative law from the Northwestern University School of Law in Chicago.

Mr. Bono, why don't you begin.

TESTIMONY OF CHARLES N. BONO, PRESIDENT, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.; JACOB FRIEDES, RETIRED ADMINISTRATIVE LAW JUDGE, BUFFALO, N.Y.; AND VICTOR G. ROSENBLUM, PROFESSOR OF ADMINISTRATIVE LAW, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, CHICAGO, ILL.

Mr. BONO. Mr. Chairman, let me begin by saying that, as president of the association, I appreciate all of the comments that have gone before by yourself and Senator Levin, with respect to many of the problems that are occurring. I also appreciate the comments that were made previously by Senator Pryor and Congressman Stark. And it is a great assurance to the administrative law judges, I'm sure, in the field, that so many Senators and Congressmen are fully aware of the various problems we are facing.

I am appearing here today as president of the Association of ALJ's at your invitation. The association, its individual members and members of the board, sincerely appreciate the opportunity to address the three important issues which you have chosen for study, and to delve into the very serious problems and seek ways to solve them.

We applaud your interest, Senator Cohen, in the various problems which you have demonstrated in the past, and Senator Levin, and the various members of your subcommittee and other Senators and Congressmen, in seeking out methods to safeguard the fairness of the appeals process in the Social Security Administration from adverse pressures brought to bear on it by various bureaucratic programs that promise to destroy due process for the citizenry of our country.

Let me take this opportunity to assure you that I am not here today for any personal reasons. I am an administrative law judge with the Office of Hearings and Appeals. I am an average, everyday, administrative law judge who hears cases for the people that come before me, and attempt to do my job. Myself and other officers and members of the board of the association, have an extreme additional burden in attempting to deal with the various problems which you are addressing today as officers and members of the board of the association.

I am here today at your invitation to fulfill my duty as the president of the association, as an administrative law judge and as a lawyer and an American citizen.

In the past, SSA officials have indicated to this committee and others that the concerns that are expressed by the administrative law judges to actions of this administration are minimal, and that only a few ALJ's are concerned about the problems that are occurring. I am here today to tell you that that is not the case, and I think all the evidence will speak to the contrary. I believe that Congress needs to clearly understand that it is a great concern of many administrative law judges in the Office of Hearings and Appeals that what is occurring must be stopped and be stopped immediately, before more irreparable damage is done to the fairness of the hearing process.

The Administrative Law Judges Association has attempted by various means, passing resolutions, et cetera, doing everything in its power to bring to the attention of the administration the various problems and have met with very little success in that respect.

I can assure you I am not here today for any motivation of personal gain. Indeed, to the contrary. My actions as the president of the association, in my opinion, supported by many ALJ's throughout the past years, have not made me extremely popular with management officials of the Social Security Administration. It is, indeed, much easier for many other ALJ's to go along with the system that is being perpetuated on them. Many of them are doing that. It is regrettable, but that is happening.

A statement of our association, consisting of 17 pages, has been filed with your committee. I respectfully request that it be made a part of the record. I, of course, cannot read it verbatim and will not do that, because it is quite lengthy, and I am sure you are only interested in an opportunity to discuss some of the issues more informally with me, which I will be willing to do. But I would briefly summarize the contents of that memo, with your permission.

I think it is fair to say that history has established that the Social Security Administration has a documented record of mismanagement, misconception, and improper management pressures in its records, so far as the operation of hearings and appeals is concerned. Its misguided management policies were documented in previous congressional hearings that were held and survey and issue papers reported out of those congressional hearings in 1979. History has repeated itself within a very short time, and we are now faced with new programs of the Social Security Administration to increase productivity, monitor production rates of administrative law judges, and allowance rates of the judges, and generally rate and evaluate their performance for purposes alleged by them to be proper management practice.

These management programs or Administration policies which they are pursuing are adversely affecting the ability of the judges to provide fair hearings. I sat here quietly through the comments made by the Associate Commissioner, Louis B. Hays. I think it is fair to say that I am surprised by some of the representations that he has made to you here today, because from my experience, I do not agree. He replied to questions of your committee to the effect that there are no goals or quotas for production, yet the record seems clear that they are exactly that, no matter what you may call them, in the Social Security Office of Hearings and Appeals. He represented to you that the pressures that are being applied, admitting that there are pressures, are not improper.

He admitted to the members of this committee that his agency is rating and evaluating the performance of certain administrative law judges. He asserted that the Bellmon review permits that an proved that judges who allow more cases are more defective in their decisional product than judges who do not.

He also assured you, on the basis of a pilot program, that a recon hearing system that is being set up, a pilot program, is going to be better yet, than anything that's ever been done, implying it's going to be faster and much quicker and, impliedly, much better than the hearings that the administrative law judges are conducting.

Now, to summarize the pressures. We have done that in the paper, filed by the association, and I won't restate it, except in summary to say the tracking of the individual performance of ALJ's on a monthly basis goes on ad nauseam. Much, much governmental expense is required by what they do in this respect. They keep track of the exact disposition rate of every administrative law judge, his hearing rate, and his allowance rate, which they refer to as a reversal rate, and I am glad the members of the committee have pointed out, it is not a reversal rate at all, it is an allowance rate.

The number of hearings a judge holds per month, the length of time he takes to process his cases, just about anything you could want to know about the individual ALJ is contained in these records which the agency keeps. Now they assure everyone that they're not going to use it for any improper purposes. Yet the record reflects that once the agency has it, the temptation to use it is beyond its ability to overcome. They have established national averages of production, and I think, in the Associate Commissioner's testimony, he talked about on the average, national averages, acceptable levels of performance, all the key words with respect to standards of performance, he has given you in his testimony here today.

The fact of the matter is that the agency of the Social Security Administration is rating and evaluating the performance of its individual ALJ's. The Administrative Procedure Act prohibits such conduct, and also the regulations of the Office of Personnel Management also provide that it should not be done, yet it is being done, for whatever reason.

Now there are additional factors that I think all too often are not understood. How does the setting of a quota or standard of performance affect the judge's ability to do his job? I think it would be obvious, but many times no one seems to understand that. I will give you my personal example of a situation that I have to deal with, because I know it best. I can tell you that it is the frustration that the ALJ's have to deal with. I have to hold hearings, and I have to see that the record is properly developed so I can make a fair and adequate decision, and I have to see the decision that is issued is well articulated, well reasoned, and fully explains the reasons for my decision, in accordance with the Administrative Procedure Act.

What do I have to do this with? I have a hearing clerk who has a quota. I have a hearing assistant who has a quota in numbers. I have a staff attorney to help me write my decisions who has a quota in numbers, and they're all different. So a judge has to juggle them all. On the one hand, he has been informed by his agency that a decisional output of less than 20 decisions per month may be enough to make the agency charge you, and remove you from office. At the same time, he sees that his staff attorney has a decisional quota to draft 40 decisions per month. And his hearing clerk has to mail out 25 decisions per month in order to meet her performance level.

To add to the dilemma we're faced, contrary to the way it used to be, with the judge no longer having any supervisory control, except on an individual case-by-case basis, as they call it, of the staff that works for him. This has been accomplished by pool methods whereby a manager, a non-ALJ, has control of all the staff that has to do the work for the judge, or help him with his work.

Additionally, the filing of the MSPB actions has made is abundantly clear that this Administration has decided that it is their role to establish a standard of performance for ALJ's, to rate and evaluate them on numbers, make a judgment as to whether they should be charged with the MSPB to seek their removal.

The whole purpose of the Administrative Procedure Act was to prevent an agency from having the power to rate and evaluate the performance of its individual ALJ's.

Many say, "Well, does this mean then that you're totally unaccountable?" No, that is not what the Administrative Procedure Act said, and it's not its intent.

Administrative law judges in the Social Security Administration are the most accountable Federal Government employees that exist. Their decisions have to be in writing. They have to hold water, so to speak. They have to be well reasoned, and articulate. They are checked by appellate levels through the U.S. district court system. To permit management to continue with these various aspects of what they consider to be their prerogatives and interfere is to make meaningless the decisional independence of the ALJ's.

I think the best example of what this has come to is a memorandum I recently received from an ALJ who had received one from his regional chief judge, instructing him to turn 15 of his decisions over to a staff attorney in an office in another city—who the ALJ was not familiar with—to write his decisions. And the regional chief judge additionally instructed the ALJ that, since he made the decisions, he'd better sign them or action would be taken against him, implying to the ALJ, "It's going to be prepared by somebody else and you'd better sign it."

This has serious implications. It tells individual ALJ's that, for whatever reasons, management perceives its role to be now to tell ALJ's, who must write their decisions, how they must be written, what rate they must be put out at, and all of it brings to bear impossible pressures on the administrative law judge.

I have addressed, in the statement, concerns about the acquiescence in the rulings. I think recent events have indicated that the administration has accepted the fact that various policies that they have been implementing in their criteria of disability are ill advised, and they are stepping back, so to speak, from what has been done with some of these rulings and the strict criteria they've established.

And I really don't have the information to know exactly what they intend with respect to issuing more "liberal criteria," as they put it.

But I would have to say that the ruling problem is a serious one, and rulings must not be put out that interpret the law that have not been subjected to public comment.

This could have been done through the public comment provided in the regulations publications of the Federal Register; it has been done in the past. And indeed the recent U.S. Supreme Court decision in the *Campbell* case vindicated policies of the Social Security Administration that had been published in the regulations, not that were simply published as rulings without following rulemaking procedure.

I think the result of the Supreme Court decision would have been opposite if it had been the rulings they had been considering, because the aspect of notice which is extremely important, would be missing.

Of course, the agency has the right to publish regulations for public comment in the Federal Register; we do not question that. I have set out in the statement, the dilemma rulings that are not published, place the administrative law judge in. He is serving two masters and it makes it extremely difficult.

I am a lawyer, I am an administrative law judge, and I am a Government employee. And I find it most regrettable that my roles seem to be conflicting one with the other, because as a lawyer I cannot ignore the U.S. district courts or the circuit courts of appeals and apply unpublished rulings, yet my employer seems to be saying I must. And I think that's an unreasonable request of an administrative law judge.

Additionally, it's a waste of money for the American taxpayer, because if the U.S. district courts are going to allow the claims based on their interpretations of the law, which are contrary to the unpublished rulings, it doesn't make must sense that we have to deny them so they can appeal and then remand it and then appeal again, back and forth. Something better has to be done than using this nonacquiescence theory to solve the problems of policy that the Social Security Administration has.

I know I've probably gone quite beyond my time of 10 minutes, but I would like to mention what the Bellmon amendment of the Social Security Administration proves. I took the administration's position to be that their studies had indicated that the judges who allowed more cases were more decisionally defective than judges who did not have high-allowance rates.

It's interesting to note that nobody ever talks about what standards are being used to decide what is a decisional defect. I think there's documentation to establish that the Associate Commissioner said, "Well, even if you made the right decision, you may be decisionally defective."

Well, I don't know what all that means, but I would point out to you that, in February 1981, I, as an individual administrative law judge—I would like permission to have this submitted into the record—sent a letter to the then-Secretary of Health and Human Services, Richard Schweiker, dated February 23, 1981, pointing out that many ALJ's had serious concerns about the planned Bellmon study, because as the Social Security Administration was interpreting it, they were going to study the high-allowance judges.[1]

In view of the fact that it had been the policy of the Social Security Administration to encourage judges to write format, short-form decisions, and that's basically all they would have to study for the period in question, there was every good reason to believe that nobody could make an accurate determination about the quality of work that was being done by the ALJ's in their decision writing.

Particularly, I would comment in disagreement with why the Bellmon amendment occurred. I don't think the intent of Congress was to do what has been done. I would hope not. But, additionally, the ALJ's were aware of the fact that everyone—in fact, in congressional committee hearings, it was established that the reason that the ALJ's were reversing more of the lower determinations, the 60-percent average, I think, while the recon determination level was denying 82 percent, was because the lower levels were using policies that were in contradiction to the regulations that were in effect from 1976 to 1980 with respect to medical improvement on cutting people off with disability benefits.

For example, while the lower levels did not need to find medical improvement to redecide the case, so to speak, the administrative law judges, bound by the regulations, were required to find medical improvement or other conditions.

That was later changed in 1980, but I think that explains the reason for the diversity of the two allowance rates, the two levels.

In closing, I would just say, whatever the intent is—and I've heard so much about intent over the years—"we don't intend to do this, we don't intend to do that," it is not important what the intent is. And I'm not here to talk about that. What is important is the effect.

And I think there's enough evidence to establish that the effect has been adverse. Many ALJ's have had to personally sue the agency. Now the Association of Administrative Law Judges has had to come to the U.S. District Court in Washington, D.C., at great expense to attempt to obtain relief, and that outcome is not in any way certain.

I have every confidence that we will prevail there, but when and how much it's going to cost us to prevail, I don't know.

But in closing I would say that whatever this committee or members of the committee can do to alleviate the problems of the administrative law judges would be sincerely appreciated.

I think legislative action is needed; I'm gratified to see that various bills are being introduced to deal with the various problems. The Association of Administrative Law Judges has previously sponsored and gone on record in support of a unified ALJ Corps court concept. The Association of Administrative Law Judges is also working with Senator Metzenbaum's office on an Administrative Review Commission bill, and we hope one of these two conveyances will take the administrative law judges out of the peril that they now stand in and are continually subjected to.

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[1] See p. 377.

And the bottom line on it is to free the ALJ's from these improper pressures of the agency which keep recurring over and over again, year in, year out, no matter what happens. It seems to be a foregone conclusion that it has to occur, and I think to give true meaning the APA, we can no longer deal with the fiction of independence on paper. It must be reality, and I respectfully request that the legislation that has been introduced as to the unified corps and the prospective Administrative Review Commission be seriously considered.

Senator COHEN. Thank you very much, Judge Bono, for an eloquent statement.

Before moving to Professor Rosenblum, I'd simply point out that we're all subject to rating games. Our constitutents rate us on a whole variety of issues, as do the ADA, AFL-CIO, and those are legitimate. Also some Members have found that by belonging to a certain caucus on the Hill called the Military Reform Caucus, we found that various branches of the service, one in particular, were conducting their own informal ratings of us.

Those members who are dedicated to trying to reform the way in which we procure weapons systems suddenly found we were being rated by the Navy last year. I happened to get a good rating, I got 100 percent. No complaints, right? [Laughter.]

Except I have a complaint. One of my colleagues got a 40 percent. Of course that was leaked. The implication was that one of my colleagues is only 40 percent committed to a strong Navy, which doesn't necessarily reflect the truth.

We have different opinions; we have different approaches. Senator Levin and I don't agree on a lot of issues dealing with how we ought to structure our forces, but it doesn't mean that either one of us is less committed than the other to building a stronger military.

I found that particularly odious, I must tell you. The notion that an executive agency—which is really supposed to be subservient to civilian control—suddenly is rating Senators, finding out which ones are good and which ones are bad, then leaking it to the press, so that it would hurt them back home.

So I think we're all very sensitive to the rating game.

Mr. ROSENBLUM. This is also faculty evaluation time, Senator.

Mr. Chairman, members of the subcommittee, my name is Victor G. Rosenblum. I've been a professor at Northwestern University in Illinois since 1958, and am a past chairman of the administrative law section of the American Bar Association, and a current vice president of the American Judicature Society.

Although my testimony before you is not likely to be incompatible with positions of the ABA and AJS, and although I'm probably pro-Bono here today, I should make it clear I am testifying on behalf of no one but myself. My views on administrative law judges have developed in the course of studying and teaching about the administrative process for some 25 years.

Though my experience is predominantly academic, I hope that such ties as having been a staff counsel with the House of Representatives Committee on Government Operations, service as a member of the then-Civil Service Commission's Advisory Committee on Administrative Law Judges, service as a member of the advisory committee to the National Institute on Law Enforcement and Criminal Justice and consulting work with and current membership on the Administrative Conference of the United States have provided ties with the real world that will keep my testimony from being purely academic.

I'd like to focus on issues affecting appointments, tenure, and roles of administrative law judges. I believe that any plan, policy, or program that reintroduces political influence over the decisions of administrative law judges embodies an idea whose time has long since passed.

One of the great strengths of our governmental system is our capacity to direct and confine political controls to those areas and institutions that can be nurtured and enhanced through them.

The legislative branch of our Government offers a prime illustration of constructive political controls. At the same time, the judicial branch of our Government has acquired its stature because it is recognized and accepted that politics can play no part in the decisions of our Federal judges.

That the administrative process is a hybrid of legislative, executive, and judicial roles in its totality has never meant that there are not particular functions within the agencies that cannot be identified as legislative, executive, or judicial.

The administrative law judge performs a judicial function that parallels within the administrative process the roles of our other Federal judges within the broader governmental process.

ALJ's are vital components of a system of administrative decisionmaking that strives to be fair, flexible, accountable, and efficient in serving the public interest.

The ALJ's are not dominant figures standing at the apex of a hierarchy of decisionmakers, but rather are expert independent factfinders and legal analysts with finely honed skills as presiding officers and evaluators of the credibility, weight, and thrust of evidence to facilitate efficient and just application of policy and disposition of cases by the Nation's regulatory bodies.

That judicial office has been and must continue to be free from political pressures and influences. Reinstitution of politics as a means for controlling adjudication constitutes repudiation and degradation of the bona fide reforms of recent decades.

Congress asserted the importance of the principle that adjudication should not be subject to politicization when it adopted the Administrative Procedure Act in 1946, especially section 11 of that act dealing with hearing examiners. The language could not have been clearer or more forthright in this respect.

> Hearing examiners shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as hearing examiners. A hearing examiner appointed under section 3105 of this title may be removed by the agency in which he is employed only for good cause established and determined by the then Civil Service Commission on the record after opportunity for hearing. Hearing examiners are entitled to pay, prescribed independently of agency recommendations or ratings.

By making salaries independent of the employing agency's recommendations or ratings and especially by appointing hearing examiners for life, with removal only for good cause as determined by the Civil Service Commission, now by the Merit Systems Protection Board, Congress established standards for dealing with ALJ's that veered from those for dealing with many other agency employees, but Congress felt these exceptions and changes were necessary to ensure independence and impartiality.

The American Bar Association launched a vigorous campaign in 1947 to insure the success of the new system under the Administrative Procedure Act, and the ABA Journal noted in 1947 that:

> Of personal and professional interest to many lawyers are the steps taken to implement the provisions of the Administrative Procedure Act to secure impartiality and independence and security of tenure on the part of hearing examiners for the agencies.
>
> The ABA hopes that the final selection of examiners will be of men who are free from bias, ideological preconceptions, partisan fealty, subservience to pressure groups, habits of unfairness, disregard of the true values, and weight of evidence.

On Capitol Hill, the chairman of the Senate Committee on the Judiciary, Senator Wiley of Wisconsin at the time, said also that appointments must be nonpartisan, with choices based on fitness rather than a narrow partisan and ideological basis.

An excellent overview of Congress intentions for hearing examiners under the Administrative Procedure Act was given at the time by Prof. Morgan Thomas of the University of Michigan in an article in the Yale Law Journal. Professor Thomas noted that:

> Integral to the new procedure was the creation within each agency of a special corps of hearing examiners independent of agency control or influence.

He said many other things as well that are in my complete record of testimony, but I will leave the other references out at this time.

The report of the Committee on the Judiciary on the Administrative Procedure Act explained concisely the reasons for the provisions that had been put in to protect tenure and independence in section 11.

> The purpose of this section is to render examiners independent and secure in their tenure and compensation. The section thus takes a different ground than the present situation, in which examiners are mere employees of an agency. Recognizing that the entire tradition of the Civil Service Commission is directed toward security of tenure, it seems wise to put that tradition to use in the present case.

It is interesting to note that Congress had been presented with and rejected other proposals for dealing with hearing examiners. One of these proposals included specific terms of office.

Under a plan proposed by the Attorney General's Committee on Administrative Procedure, the hearing examiner would have held office for 7 years and then would have to be renominated by the agency and reapproved by the Office of Federal Administrative Procedure.

Professor Thomas explained that in rejecting proposals like this a concept that was predominant in congressional thinking was "that the guarantee of security of tenure was the appropriate way to insure that the examiners would be free from subservience to their agencies."

As Justice White pointed out more recently in the Supreme Court's decision in *Butz* v. *Economou* in 1978:

> Judges have absolute immunity, not because of their particular location within the Government, but because of the special nature of their responsibilities. We

> think that adjudication within a Federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such administrative adjudication should also be immune from suits for damages.
>
> There can be little doubt that the role of the modern Federal hearing examiner or administrative law judge within this framework is functionally comparable to that of a judge.

Although the *Butz* case focused on the issue of immunity from suits for damages, Justice White's opinion stressed the independence and integrity of administrative law judges' decisions as justificiation for immunity.

Quoting again from Justice White, he said:

> More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.

I take particular note, in light of today's testimony, that Justice White said "free from pressures." He did not use an adjective to qualify the term "pressures." What was important was that administrative law judges be immune from any and all pressures by the parties or officials within the agency.

Since the securing of fair and competent hearing personnel was viewed as the heart of formal administrative adjudication, the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners.

Justice White then concluded:

> In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women.

Although no sitting Federal judge would be likely to testify before you about how he or she would react to political invasion of ALJs' independence of judgment, it would be reasonable to predict that judicial review would have to take on stricter, lengthier, and more detailed and costly scrutiny.

If a reviewing court can't have the kind of trust Justice White expressed in the integrity and independence of today's ALJs', such a court would have to probe more deeply and extensively in order to be satisfied with the fairness and substantially of the record before it.

In short, in addition to adverse impacts on recruitment and morale, intrusions upon ALJ decisional independence could also spur a return to suspicion, stalemate, hostility, and stagnation in court agency relations that were hallmarks of the early 1930's.

I urge the distinguished members of this subcommittee to preserve and protect the gains made in our administrative system by the function of fair, impartial, and nonpolitical administrative law judges. Subjecting these judicial officials to political controls in the 1980's would unfortunately say to the Nation that nothing recedes like success.

We can improve decisionmaking mechanisms through enhancement of knowledge and decisional integrity. We can only corrode or destroy these decisionmaking mechanisms by subjecting administrative law judges' decisional independence to political control.

What are the indications of political controls in recent operations of the social security disability program?

There are a number of harbingers. Consider the *Nash* v. *Califano* case of 1980 as an example.

The case of *Nash* v. *Califano* was a product of intensified pressures by the agency on ALJ decisionmaking in terms of both numbers and outcomes of decisions. The technical issue in the *Nash* case was whether an ALJ had standing to sue where an agency allegedly interferes with his or her decisional independence.

The district court judge had ruled that Simon Nash, an ALJ with 22 years experience in the Social Security Administration's Bureau of Hearing and Appeals, had not suffered the injury in fact required by the doctrine of standing when Nash was subjected to the bureau's monitoring and reviewing program.

Among other contentions, Judge Nash complained that arbitrary monthly production quotas had been established by the agency and that what the agency designated as a quality assurance program was in reality an attempt to direct the number of decisions awarding or denying social security benefits. ALJ's deviating from the average 50 percent reversal rates for all decisions were allegedly counseled and admonished to bring their rates in line with the national average on pain of sanctions.

While carefully pointing out that his ruling dealt in no way with the merits of Judge Nash's contentions, court of appeals' Judge Kaufman first quoted from Justice White in the *Butz* case on the current structuring of agency adjudication to assure ALJ's independent judgment.

Then Judge Kaufman went on to rule that—

> Express prohibitions of performance evaluation and substantive review by the ALJ's agency and appellant's position description promulgated by the Bureau of Hearings and Appeals give his injury the required direct impact upon statutorily created rights.

Judge Kaufman closed the court of appeals' unanimous opinion with the admonition that—

> By providing an authoritive delineation of the respective rights and powers of the parties to this litigation and by recognizing that good administration must not encroach upon adjudicative independence, the District Court on Remand will have the opportunity to advance the principal goal of judicial and quasi-judicial administration, reduction of delay without compromise of the demands of due process, of which judicial independence is but one important part.

Judge Kaufman's view of ALJ's was entirely compatible with the 1973 opinion of Attorney General Levi on the power of agency officials to reprimand ALJ's. Attorney General Levi differentiated between independence of ALJ's status in decisional action on the one hand and of personal conduct on the other in responding to the question: May the head of an agency of the Federal Government issue a reprimand to an administrative law judge employed in his agency without initiation of proceedings before the Civil Service Commission?

Recognizing at the outset that the question presented poses in a new context the recurrent issue of the intended scope of independence of administrative law judges from the control of their parent agencies, Attorney General Levi proceeded to describe what the Administrative Procedure Act conferred on ALJ's as "a certain degree of independence of status, but not complete independence from administrative control."

Reprimands for failure to report to work on time or to put in a full day at the office do not, he said, have to await the adjudication of charges by the Civil Service Commission.

On the other hand, such functions as regulating the course of the hearing, which I take it includes the amount of time that is necessary to conduct a fair hearing, holding conferences for settlement or simplification of issues, disposing of procedural requests, and especially making or recommending decisions, unequivocally required unencumbered independence of ALJ judgment.

Senator **Cohen**. Professor Rosenblum, could I ask you if you could summarize the balance of your statement so we might hear from Judge Friedes? We have a panel to hear from yet.

Mr. **Rosenblum**. Certainly.

It seems me that the central position that has been taken in the past by those understanding the role of the administrative law judges who have spoken on the subject in the U.S. Supreme Court, in the U.S. Courts of Appeals, and in the Office of the Attorney General of the United States, would be to oppose the notion that agency practices geared predominantly if not exclusively to numbers and percentages of genuflections by ALJ's to agency infallibility are appropriate for the judgment of ALJs' work.

I respect and admire the independence of the ALJ, the integrity of the ALJ, the freedom of the ALJ from domination, and the right of the ALJ to be secure from the notion that he or she is being selected for surveillance solely because of the percentages of decisions that the ALJ has rendered which have allowed recovery by parties who have been before the agency. Corrosion of any of these principles by an agency represents in my view a violation by such agency of the expectations of this Congress, of the expectations of Justices of the Supreme Court of the United States, and of the other courts.

I hope, perhaps at a later, point, there will be an opportunity to bring out some of the other issues that I would hope to be able to cover.

Senator **Cohen**. Professor, if you would see that we get a copy of that statement in addition to the one which you otherwise have, we will see that it is included in the record.

Judge Friedes.

Mr. **Friedes**. I guess what I have to state is really an epilog to what the previous two speakers have so eloquently presented.

I am here at the request of your subcommittee, which practically started from a letter I wrote to Senator Heinz at the request of my wife—I have to get my wife into this—and I am only speaking for myself.

My education has been summarized in the papers which I submitted this morning, and my work experience similarly. Suffice it it say, I have over 28 years experience in administrative law, with at least the last 17½ years until my retirement as an administrative law judge in the Office of Hearings and Appeals.

I would like to put this also in a personal work setting to see the perspective of my work. There are many dedicated civil servants in OHA and the social security district offices. I also realize that the mission of OHA has become increasingly difficult; however, it is vital to the general welfare of our country.

I also believe that to be credible the Social Security Administration and the Office of Hearings and Appeals must be fair. Some of their practices created and increased my job dissatisfaction to the point that I decided to retire.

The specific events leading up to my retirement—I dictated this speech yesterday, so you may have it already—the specific events centered around OHA pressure dealing with production, scheduling of hearings, number of adjournments, reconfiguration, and, later, the reversal rate.

My production significantly declined from a monthly average of over 34 dispositions in 1979, after I had difficulty in replacing a highly competent staff attorney, and my office went gradually from a unit arrangement to full reconfiguration.

OHA set a minimum of 50 cases to be scheduled a month and raised questions about my adjournment rate for 1 month, when it was 30 percent.

Shortly before I retired, I was informed that my decisions would go under Bellmon review because my average reversal rate was over 70 percent for a 6-month period, but this review was withdrawn because of my retirement.

By the way, my reversal or remand rate by the Appeals Council was extremely low, with very few reversals or remands. So, consequently, I feel deficiency was not established by the remands or reversals by the Appeals Council or by the district court. The full details are set forth in the papers that I have submitted this morning.

You also asked me to discuss certain issues affecting ALJ decisionmaking.

The Social Security Administration's policy of nonacquiescence in certain decisions rendered by the Federal Courts of Appeal was the first issue you wished me to address.

The purpose, to establish a national rather than a regional social security program, is a laudable purpose; however, the nonacquiescence program expressed in SSR's raises the legal question, whether the SSA can pick and choose which court decision it will and will not follow.

The SSA directs its staff, including ALJ's, to ignore those court decisions it will not follow. ALJ's are bound by these SSR's, although they are officers of the court.

The Social Security Administration also participates in determining which adverse court decision it will not appeal. Thus, as you heard from, I think, Commissioner Hays, the Administration's Solicitor General appealed the *Campbell* decision, but I believe there was no appeal in the *Finnegan* case, with the doctrine of nonacquiescence enunciated in an SSR.

This policy of nonacquiescence also presents, I believe, a poor example to citizens who cannot pick and choose which court decision to observe, but must observe all.

The second issue you asked me to address was the SSA's adoption of POMS into SSR's. The purpose was to insure that all levels of SSA—initial, recon, ALJ, and Appeals Council—follow the same disability standards. While the purpose is laudable, the adoption of POMS into SSR's without notice of proposed rulemaking deprived the public of an opportunity to study and comment on these matters before their adoption.

The Secretary, however, may have a valid legal support in the APA, 5 U.S.C. 553, but the Secretary restricted the support in June 1982.

The adoption of some of these POMS has also restricted ALJ discretion.

The details of this argument are also set forth in my papers.

Now, although ALJ's in January 1983 were presumably applying the POMS and the SSR's, their reversal rate was about 50 percent, still a significant reversal of reconsideration determinations when both presumably used the same disability standards.

Now, there are other developments affecting ALJ independence. The first was the adoption of the grid system, which replaces the individual claimant approach in determining ultimate work with the use of a VE, vocational expert, by administrative notice of alternate sedentary, light to medium work in exertional impairment cases.

As I explained in my papers today, the recent *Campbell* decision of the U.S. Supreme Court raises a question about the possible extension of this administrative notice to combined exertional and nonexertional cases in contradiction to the Secretary's regulations. This is further explored in pages 5 and 6.

The next item was the Bellmon review. I believe the Bellmon review, as practiced by the Administration, presents a one-sided Appeals Council own-motion review of ALJ's who have a high reversal—Senator Levin, as you clarified—allowance rate, with the implication that they have a high error rate, but in determining Appeals Council own-motion review, what about other factors, as you brought out, such as a high affirmation rate, a high remand rate by the Appeals Council or the district courts? What about the length of hearing, the nature and amount of documentary evidence, the presence of representation, the use of expert witnesses?

I suspect that the Bellmon review, or the possibility of such review, may have had an impact on the reversal rate of ALJ's, but this is pure conjecture on my part.

Next, the experimental adversary proceedings, which changed the fundamental nature of the social security hearings by the Secretary's regulation and raised a possible conflict of interest by the SSA representative without congressional involvement in these changes.

Last, but not least, the adoption of new technology programing, apparently compulsory, canned decisional paragraphs.

In conclusion, the Social Security Administration incorporates three traditional legislative, executive, and judicial powers without appropriate external checks and balances.

I believe the social security program requires reconciliation of mass claims with individual justice, and the latter requires an independent decisionmaker such as the administrative law judge at some administrative level.

While SSA and OHA objectives of certainty, consistency, uniformity, predictability, and national program are praiseworthy, if the means for their attainment jeopardize their just accomplishment, the substance of these objectives is fatally flawed.

I don't think there is any one solution, but I offer certain suggestions.

One, I explore them in much more detail in my papers today—appointment of a special committee to review the concentration of governmental powers in the SSA and the possible separation of OHA from SSA and possibly from HHS, the Department of Health and Human Services.

Second, reforming the social security claims-determination process, beginning from the base, initial determination, and continuing through reconsideration determination, especially with better qualitative and quantitative input and representation of claimants at these levels. Commissioner Hays explored an experimental program perhaps along these lines.

Third, the establishment of a legal internship program involving law schools and OHA and possibly SSA.

Fourth, an accelerated judicial review from conflicting courts' decisions with SSA and HHS required to proceed with such appeal rather than rest on nonacquiescence.

Last, mandatory notice of proposed rulemaking before any SSR can be valid.

Thank you.

Senator **Cohen**. Thank you very much. I just have one or two questions on the pilot project. I will address them to the two judges.

In your judgment, would a 20-minute review of a file and a 30-minute timeframe for a hearing, and another 20 to 25 minutes be sufficient to dispose of the average case, in your experience?

No. 1, would it be? No. 2, is it desirable? What would be the impact of having that sort of a mandated—let me see if I can get the right times—20 minutes for a review of the file for a hearing officer; the hearing would take 30 to 45 minutes; 20 to 25 minutes to prepare the decision?

Mr. **Bono**. I think establishing such standards is totally unrealistic.

The first thing you have to know about social security claims and the hearing of those claims is that each of them may be different, and standardizing, so to speak, at that level is just as objectionable as at our level.

And, the concerns of establishing a hearing process at the reconsideration level with those types of standards would be extreme, and I think unfairness would be the result.

Senator **Cohen**. Judge Friedes.

Mr. **Friedes**. I agree with the results, but I have an addition.

There seems to be, according to that scheduled sequence of events, a 20-minute review. There is no indication of the importance of documentation. There is a total absence of the need of prehearing documentation.

I noticed that in the report which was submitted by the Secretary to the Congress on the Bellmon review, he pointed out that an experiment with the 3,600 cases showed that, with the removal of the additional documentation that had been secured after reconsideration, there was a change of about 16 percent in the decision. In other words, the additional input of documentation had such a significant role to play in determining what the decision would be.

I don't see from your schedule that there is any additional documentation or review for purposes of determining whether documentation is necessary after the initial consideration.

Mr. **Rosenblum**. If I may add, Senator, a judge, to be a judge, has to be in control of the proceeding. It may be that some proceedings can be resolved in less that 20 minutes, but that is a determination that can only be made by the judge, and it is a denial of due process to seek to straitjacket the proceeding and to prescribe in advance its being limited to 20 minutes.

Senator **Cohen**. Let me say, from my own experience in handling a lot of workmen's compensation cases when I was a young lawyer, there were some cases that I could go in and dispose of, with the hearing examiner and the insurance industry or company being present, in 5 minutes. Those were the uncontested cases.

There were those in which we had conflicting medical evidence, in which I had to bring in a witness, a medical witness, and there was an opposing medical witness, that took all morning, sometimes all day.

It seems to me the essence of what you are saying is exactly right. Those cases which are going to be contested, or in which there is going to be some question raised about the extent, indeed, the existence of disability, cannot be subject to any kind of arbitrary timeframe, that we set, like so many hamburgers coming out of McDonald's, put it on a production line, and keep that production line going. That is not the way in which we should treat our citizens.

Mr. **Friedes**. Senator, as a matter of fact, we conducted in our office a prehearing screening experiment, in other words, to find out which cases could be disposed of without the need of a hearing. We found that there would be a number of such cases. I described that in my letter, which is part of the papers today, too.

Mr. **Rosenblum**. Senator, there is an excellent manual which was written and is now in its second edition—written for administrative law judges, and for agencies employing administrative law judges that was done by retired Judge Merritt Ruhlen of the Civil Aeronautics Board. That manual is a superb analysis and description of the tasks and responsibilities of the administrative law judge.

It's entirely compatible with the independence and the other responsibilities that administrative law judges have, and it struck me as noteworthy that there was no reference made to it by any of the people from the agency in their testimony.

Senator **Cohen**. Senator Levin.

Senator **Levin**. Judge Bono first. Do you know if the statistics kept by the Social Security Administration on each judge, both the allowance rate and the so-called error rate, are made available to other judges?

Mr. **Bono**. They are made available to other judges, depending upon whether those judges are judges in charge of offices or regional chief judges.

Senator **Levin**. Other than any supervisory judges?

Mr. **Bono**. I do not know whether these are distributed or not. But I do know that I have received them from other judges who are not management judges, so to speak, and somehow they have obtained them.

Senator **Levin**. I believe you indicated that there is a quota. Both the judges indicated there is a quota, a production quota. Has the quota been made known to you in any written form?

Mr. **Bono**. I think it's important to understand that when we accuse the administration of establishing a quota, they call it a goal, and when we say that it's a goal, they deny that it exists. I would like to comment with respect to the Associate Commissioner's statement that there are no goals or quotas.

A quota is basically—it's my understanding—a standard in numbers. And the Associate Commissioner, who sat here today and addressed you, has, by filing charges against judges and the testimony that he gave in those proceedings, indicated that he and the other officials of management have decided that 20 decisions per month is a line which they draw. And if you fall below that production level, you are subject to extreme scrutiny and possible discharge.

And while they would like to say that is not a quota, I think the facts contradict that.

Senator **Levin**. Is there anything in writing relative to any production quota of 50 or whatever the current goal or quota or desired production figure is? Do you have anything in writing that has gone to the ALJ's? is my question.

Mr. **Bono**. I am sure there are many such documents, and they are in file in the ligitation that we have filed in U.S. district court.

I wish that I had the facilities, like the Administration has, to supply this committee with all that documentation, but it is extremely costly. But I would attempt to give the committee anything——

Senator **Levin**. If you come across such documentation, it would be helpful.

Judge Friedes, do you know of any written production goals, quotas, or whatever, obtained by the judges from the Social Security Administration or supervisors?

Mr. **Friedes**. Well, I have a memorandum. They use the term "goals" euphemistically. I think what is actually true is the goal translated is a quota.

Senator **Levin**. Whether it's a goal or a quota, whatever it is, is there any document—anything in writing—you know of that has ever been submitted to the judges from their supervisors, saying "This is what we would think is a standard. This is typical. This is a goal?"

Mr. **Friedes**. Let me read this to you. This is a memorandum, and we can make it available to the committee. This is a memorandum dated May 15, 1981, from L. Charles Leonard, regional chief administrative law judge, OHA region II, on the subject. It's addressed to Avram Weisberger, ALJIC Buffalo hearing officer.[1]

> It has been brought to my attention that in the month of April, Judge Friedes disposed of 22 cases. This number represents his approximate average over the prior 12 months, as well. What is particularly striking about this figure is that it is so inconsistent with the performance of all other judges in your office. I would be interested in knowing if there is a particular problem involving Judge Friedes which

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[1] See p. 357.

may account for this. Please meet with Judge Friedes and discuss the situation with him. After your meeting, please send me a written report as to the result of your conversation, including your estimate of what the future might hold with respect to Judge Friedes' performance in the Buffalo Hearing Office.

Then I had a discussion with my ALJIC. He submitted a report dated May 20, 1981, to Judge Leonard. Then I submitted a detailed memorandum to Andrew Young, who at that time was the Associate Commissioner of Hearings and Appeals.

Senator LEVIN. Judge Friedes, let me interrupt you, for the sake of time. If you could let us have copies for the record.

Judge FRIEDES. Yes.[1]

Mr. BONO. Senator Levin, may I interject that there are a number of low production letters that have been sent out, which you may or may not be aware of. Those specifically advise as in Judge Friedes' case, that they have fallen below what they consider to be an acceptable level.

Senator LEVIN. What I am interested in particularly is whether or not there is any written evidence that HHS has set a goal of a specific number as a typical or desired standard. Do either of you have any documents relative to that that would be helpful?

Senator COHEN. Senator Levin, if you would yield, I have a document which we are going to submit for the record, which is a memorandum to the administrative law judges, and I assume to the chiefs in charge, a listing of the fiscal 1982 OHA initiatives and objectives. One item the memo includes that I mentioned earlier was to achieve a disposition rate of 40 per month per judge by September 1982, 45 per month per judge by September 1983, and on another page it says, "to monitor ALJ's and initiate appropriate adverse action against underachieving ALJ's." That will become part of the record.[2]

Senator LEVIN. One last question, Judge Friedes. We are way behind schedule, so I may have some questions for Professor Rosenblum for the record.

Judge Friedes, what is the effect of being on Bellmon review? What difference does it make to you if they review every one of your decisions? How is that any skin off your nose? How does it affect your behavior? You are done with the case. What do you care about happens to it after that? How does it chill any decisionmaking? What's the specific, particular effect on you?

And I would like Judge Bono, if you would, to answer this question for the record later. But Judge Friedes, can you tell us in your own words?

Mr. FRIEDES. First, as I indicated previously, I was supposed to be under Bellmon review but I was retiring, so they took me off, but I can see the possibility of this. I don't look at what my figures are as I am going through the course of a month, whether I am reversing a case or I am affirming a case. I frankly don't care, as long as I feel I have done a conscientious job and I have decided it to the best of my ability. I don't care whether it's an affirmation or reversal.

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[1] See p. 358.
[2] See p. 465.

But if I am going to go under special scrutiny, I can see the possibility—hey, I don't want to be under special scrutiny. I have a lot of "gray" cases over here. Now, what is my scorecard showing this month? Do I have to start looking at my scorecard and see I am approaching that magic 70-percent figure? If I go over the 70-percent figure, I am under special scrutiny. If I am under 70 percent, I am not under special scrutiny. I can see that possibility. Again, I am speaking only for myself; I am not speaking for any other judges.

Senator LEVIN. My question is what do you care if you are under special scrutiny. You're still going to call them as you see them, aren't you?

Mr. FRIEDES. Yes, you would, but I keep on saying—what you were describing, for example. The situation about a person being confined in time. When we are confined with time, we have to get cases out. You may take the position, for example, that the burden of proof is on the claimant. The claimant is represented through an attorney—or who may not even be represented by an attorney. You feel, however, there is a possiblity that additional proof might be applicable. You don't have the time. You don't get the proof. Perhaps the proof might have changed the ultimate outcome.

An illustration is the problem I had with the administration on workers' compensation reports, which I cover in my letter. The administration has traditionally ignored a rich source of medical information—and I had quite a conflict with my regional chief on that. There are workers' comp medical reports which are available free of charge to the State agency, which they traditionally ignore.

Now, to get those reports takes time, and they may have an impact on the outcome. And if you are concerned, you have got a case which is an affirmation, which will get your perhaps mark below the 70 percent, you may not go into the workers' comp.

You see, these are purely hypothetical. I am not talking for any other judge. And it didn't apply to me, because I wasn't under Bellmon.

Senator LEVIN. Thank you.

Mr. ROSENBLUM. May I respond to that question, also? I certainly hope and believe that most administrative law judges would continue to operate in the way in which they have, but there are at least veiled suggestions that keep coming from the agency in terms that explicitly are not threatening but implicitly could be threatening, which could very well have a chilling effect. The veiled language suggests that if Judge Friedes didn't get into line that he might be subject to actions which he would have to defend himself against in a proceeding before the Merit Systems Protection Board. Consider, for example, proposition No. 27, filed by the HHS defendants in their statement of material facts as to which there is no genuine issue, in the case of *Association of Administrative Law Judges* v. *Heckler*, Civil Action 83-0124. Take that language of proposition 27:

> OHA has never proposed that any adverse action be taken against ALJ's based on an ALJ's failure to maintain an acceptable level of decisional correctness, and has no present plans to propose such an adverse action. The agency has not ruled out the possibility that such an action may be necessary in the future in an extreme case, when despite repeated appeals, council own-motion actions, counseling, feedback, and other assistance, an ALJ repeatedly misapplies the laws and regulations in social security cases.

Now, all of those actions, own-motion cases, counseling, feedback, and other assistance, have been applied in some instances solely because of the allowance rate of those judges. Thus, the veiled meaning of this statement could very well be that if you don't reduce that allowance rate, that defines you as misapplying the law, and we are going to go after you in a prosecution before the MSPB.

Senator **Levin**. Thank you.

Senator **Cohen**. Thank you very much, Senator Levin.

Mr. **Friedes**. Mr. Chairman, I have some other correspondence from the agency, which I term "quotas," about the number of hearings I was scheduling and also the number of adjournments that I was granting. Would you want that?

Senator **Cohen**. We would like that for the record, as well, and any similar type of information.[1]

We want to thank all three of our witnesses for coming this morning to present testimony which we feel is of vital importance to a disposition of this particular matter. I wish that we were not under time constraints, because we have two more witnesses who have been waiting very, very patiently all morning, and we would like to call them before us.

Thank you, gentlemen.

[The prepared statements of Messrs. Bono, Friedes, and Rosenblum follow:]

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[1] See pp. 357, 362, 367, 368.

STATEMENT ON BEHALF OF THE ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

BY

ADMINISTRATIVE LAW JUDGE
CHARLES N. BONO, PRESIDENT

UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

HEARING ON

THE ROLE OF THE ADMINISTRATIVE LAW JUDGE IN THE TITLE II SOCIAL SECURITY DISABILITY PROGRAM

JUNE 8, 1983

Mr. Chairman and Members of the Subcommittee on Oversight of Government Management:

My name is Charles N. Bono. I reside in Kansas City, Missouri. I am an Administrative Law Judge (ALJ) with the Department of Health and Human Services (DHHS), and have been since April of 1973. I am here today at the invitation of your Subcommittee. I appreciate the opportunity to discuss the important issues you listed in your letter of invitation to me:

(1) The effect on ALJ decision-making of the Social Security Administration's (SSA) policy of non-acquiescence in certain decisions rendered by Federal Circuit Courts of Appeal;

(2) The effect on ALJ decision-making of SSA's recent efforts to establish a uniform standard for determining eligibility for benefits by adopting provisions of the Program Operations Manual System (POMS) in Social Security Rulings; and

(3) Allegations that ALJs have been subject to improper pressures by the SSA agency to decide disability cases in a certain way and at a certain rate.

The Association of Administrative Law Judges, Inc., of which I am the President, is an incorporated non-profit voluntary membership professional association consisting of approximately 500 dues-paying members, all of whom are Judges with the Department of Health and Human Services, serving under the direct delegation of authority from the Secretary of Health and Human Services, and in the manner prescribed by the Administrative Procedure Act (APA). They are charged with the duty and responsibility to hold hearings and make and issue decisions in appeals from determinations.

The Association is recognized by the agency as a professional association under the provisions of Executive Order 11491. Over the years it has played a critical role in the ALJ system. The agency in the past has sponsored meetings of its officers and directors and consulted with it for purposes of its participation in a meaningful way in the management process of the Office of Hearings and Appeals (OHA). Through its activities its members have attempted to have their views expressed and considered.

The present Associate Commissioner of OHA has significantly curtailed sponsorship by the agency of Association meetings on the basis that budget factors do not permit sponsorship of meetings, and/or granting of administrative leave to Association officers or directors for Association matters. The restrictions placed on the Association by the Associate Commissioner have adversely affected its ability to hold meetings to discuss important problems, and to provide meaningful input to the agency. Communications between the agency and the Association have deteriorated.

The primary purpose of the Association, as set out in its official By-Laws and Charter, is to promote and enhance the legal protections afforded the claimants or litigants under DHHS, SSA, and OHA hearing processes and the Federal Administrative Procedure Act.

In its effort to accomplish this purpose, the Association has promoted opportunities for the continuing professional education and training of ALJs, and has presented seminars at ABA meetings, and in conjunction with the agency has participated in presentation of recent training seminars for the ALJs under agency auspices. Additionally, the Association strives to promote and preserve a professional and judicial approach and attitude among its member Judges that will be conducive to work of a professional nature, and to prevent subjection of the Judges to bureaucratic expediences which are adverse and detrimental to the rights of the claimants or litigants.

The Association has sought, whenever possible, to improve the working relationships and promote mutual respect between the ALJs and administrative management personnel. It has attempted to provide information that will result in the improvement of working conditions of its members with regard to the utilization of proper and dignified hearing space, adequate office space, and sufficient and appropriate professional and clerical staff to enable its members to carry out their duties and responsibilities.

The Association has a legislative committee that directs its efforts to work effectively in conjunction with the Congress of the United States, and government personnel agencies, as well as professional associations such as the ABA, ACUS, CALJ, FALJ and the Federal Bar Association. By these efforts the Association works towards the objective of providing and maintaining a fair and just appeals process to the claimants seeking benefits under the provisions of the Social Security Act, and the Social Security Trust Fund as well.

The affairs of the Association are directed by a ten member Board of Directors, consisting of one director from each of the ten regions of the country (elected by the membership annually by region) and four executive officers, President, Vice-President, Secretary and Treasurer (elected annually by the membership nationally). The Association has in the past and will continue to work with members of your Committee in efforts to resolve the issues you have raised.

The views I express here today as President of the Association reflect the positions taken by the Association on the issues you are studying. The three principle issues you have outlined are significantly related in that they all cause adverse pressures on the ALJs. For reasons that will appear in my report to you, the issues you have selected for study are timely, and this hearing is of critical importance.

HISTORY OF THE PROBLEM

Some background of the problems in the hearings and appeals process must be understood before meaningful discussion of the current circumstances can take place. For that reason I would like to take a few moments to capsulize the events of the past that have led SSA to where it is today in its relationship with the ALJs.

Important events that have occurred in recent years must be considered. Because of an increasing number of requests for hearings (since 1973) by claimants who were dissatisfied with determinations by lower levels of SSA, lack of a sufficient number of ALJs and a temporary loan of all SSA ALJs to the work of hearing cases for the Labor Department in cases involving the Coal Mine Health and Safety Act, a crisis developed in the hearing system represented by a "backlog" of cases. Social Security cases were taking longer to process at the hearing level. The backlog of cases reached a critical point in 1975.

SSA hired management officials reputedly skilled in efficiency measures and management control to increase the decisional output of the Judges. The bottom line was that the decisional out put of the Judges was just not enough to deal with the numbers. The newly hired management officials instituted control measures and programs designed to pressure the ALJs into issuing more decisions. Among such programs were encouraging of writing form printed decisions, development short-cuts, setting goals, and then quotas in hearing and case dispositions and gradual removal of the supervisory authority of the ALJs over the staff assigned to them.

The effect of these programs and policies converted the appeals system into a production line. At first the ALJs, recognizing the crisis in the caseload, responded without question to the pressures of management. But, as each plateau of production was reached, the goal or quota was increased. It became apparent that a real interference with the duties and responsibilities of the ALJs was taking place and the ALJs recognized it.

The adverse effects of improper management pressures such as setting goals and quotas in hearings and dispositions and assignment of staff and equipment on the basis of an ALJ's production record are documented for all to see in a survey and issue paper published in January 1979 by the staff of the Subcommittee on Social Security of the House Ways and Means Committee (96th Congress First Session Committee Print WMCP:96-2 Social Security Administrative Law Judges Survey and Issue Paper). The conclusion of those hearings was that improper management pressures had been brought to bear on the Administrative Law Judges, and those pressures had adversely affected the fairness of the appeals process in that the quality of the hearing process was sacrificed for quantity.

Shortly after the report was issued the Associate Commissioner was replaced. Other top management officials also were reassigned or left.

In July 1979 a civil action filed in 1977 by five ALJs seeking injunctive relief from complained-of management practices was settled by court decree approving settlement agreement with the defendant agency. The agency agreed to abide by provisions of the APA and discontinue the complained-of practices in setting quotas of hearings and decisions, failure to rotate cases, and other enumerated practices that had adversely affected the fairness of the hearing process, which were interfering with the ALJs' ability to fairly hear and decide the cases before them. Policy statements of the agency were issued in accordance with the court order. (Bono, et al. v. United States Of America, Social Security Administration, et al., U.S.D.C. W.D. Mo. No. 77-0819-CV-W-4)

Although that litigation had been commenced by five individual ALJs, the Association by resolution supported the principles of the litigation and contributed substantial financial support to defray the expenses of the litigation.

The agency had always defended its complained-of policies on the basis that without these improper pressures on the ALJs, they would not work hard enough, the caseload would grow and the agency would not be able to accomplish its mission. The months and years that followed the settlement of the litigation and the abandonment of the complained-of practices proved nothing was further from the truth. The ALJs, free once again to properly perform their duties and responsibilities, increased their decisional output to a point where the "backlog" was ultimately gone, and it was then referred to as a "workload" only.

The next crisis developed in OHA only after the SSA accelerated the mandated Continuing Disability Investigation Program (CDI) by commencing it almost a year earlier than mandated by Congress in the 1980 Bellmon Amendment. As the result of thousands of people being taken off the disability rolls, the number of requests for hearings before the ALJs jumped dramatically. It must be remembered that this increase in requests for hearings occurred not because the ALJs failed to move the cases rapidly enough or in sufficient numbers; it occurred because SSA, in its haste to accelerate the CDI program to take people off the disability rolls and out of benefit status, was not adequately staffed or prepared to conduct such a crash program. As the result of this ill-advised action of SSA, the number of requests were reported for the year 1981 to be 281,737 and an all-time high of 320,000 in fiscal year 1982. Since 1977, when the number was 193,657, only 61 ALJs had been added, for a total of 700 ALJs. Dividing the caseload by the number of ALJs, it could be calculated that the cases on hand per Judge at the close of 1981 was approximately 460.

The ALJs had expected a case increase as the result of the accelerated program. Indeed, officials of OHA had issued memos warning of the deluge earlier in the year. Bracing themselves for the increased caseload, the ALJs were additionally pressured by the issuance of a February 1981 memorandum from the Commissioner of Social Security advising that SSA had interpreted the Bellmon Amendment to authorize them to select Judges on the basis of their high allowance rates for special evaluation and "study" in order to permit the preparation of a report to Congress by January of 1982.

The realization that Judges would be scrutinized on the basis of how many cases they allowed was of extreme concern to many. In official memoranda the agency even referred to the Judges to be studied as "targetted". At that time I and other ALJs attempted to arrange a meeting with the newly appointed Secretary of HHS to offer assistance and information as to problems we perceived with the announced review. Many ALJs were also concerned about a series of newspaper articles that reported that high level SSA officials intended to do away with the ALJ appeal system and replace it with hearing examiners housed in the agency and more directly under their control and not under the protection of the APA (Lambro Articles). The Lambro newspaper articles revealed a transition report existed recommending the dismantling of the appeals system and replacement of it with another. (Efforts to obtain the so-called transition report from that day to this by various ALJs, the Association (myself included) under the provisions of the Freedom of Information Act and otherwise have proved totally futile). If the report could be obtained, it would shed more light on the reason for the problems that have been developing in the appeals process and the attitude of the SSA towards the ALJs.

Unfortunately, although a meeting was scheduled to be held with the Secretary and another ALJ and myself in Washington, D.C., it was cancelled before it could be held and we were advised of the cancellation by the Acting Commissioner of SSA. In the interest of the information being presented to the Secretary, letters were written to the Secretary outlining our concerns on February 23, 1981. No meetings were held and no discussions ever took place with respect to the very important issues raised in the letter, nor was the letter ever specifically answered.

In July 1981, a new Associate Commissioner was appointed. Louis B. Hays was appointed to head the OHA. His first official written communication with the ALJs was a memorandum issued July 21, 1981, wherein he expressed his pleasure with being appointed to head OHA, and he ended it by advising the ALJs that they were held in the lowest regard by SSA, the states, the Department and the Federal Government. He went on to say, "We are perceived by many, rightly or wrongly, as taking unreasonably different approaches to deciding cases, as having untenable reversal (allowance) rates, and being generally unaccountable for our actions. I believe that you and I have a limited time to work together to correct these perceptions before solutions are imposed upon us by outside forces beyond our control ." The memorandum added to concerns that the particulars of the Lambro articles were accurate, and further accentuated an attitude that the ALJs were allowing too many claims.

In October 1981, I appeared before the Subcommittee on Social Security of the House Ways and Means Committee to address various issues with respect to proposed legislation to establish a Social Security Court, and other issues including what measures could be taken to deal with the crisis that was occurring again in the number of cases to be heard by ALJs and resurrected management pressures that threatened the fairness of the system once again. The Association presented a position paper outlining the concerns of the Association with respect to extreme pressures being visited once again on the ALJs. In that position paper a recommendation was made that the ALJs be removed from the control of the SSA, and that failing that serious consideration be given to amendment of the APA to include enforcement provisions that would guarantee the ALJs freedom from interference by the agency with their duties and responsibilities to provide fair hearings. The position paper of the Association concluded with this statement: "This committee should be aware that continued friction between administrative law judges on the one hand attempting to perform their official sworn duty, and management officials managing the system on the basis of fiscal and numerical considerations is extremely perilous to the fair hearings process."

The newly appointed Associate Commissioner, who had earlier testified at the hearing, exemplified management's determination to revert to management by numbers, when he projected to the Chairman of the Subcommittee his assurance that he could achieve an average decisional output per judge of 45 decisions per month by 1983. At that time such an assurance seemed to me to be wholly unrealistic and contrary to the interests of maintaining a fair hearing process, and still does.

Once again the management officials of OHA embarked upon a program of pressure on the ALJs to make them do more and more, and reappearances of previously discarded objectionable management pressures occurred. Reports increased that many of the provisions of the settlement agreement and the policies issued in accordance therewith were being openly violated by administration management officials. The Association passed resolutions objecting to the renewed pressure but they were either rejected or ignored.

In the early part of 1982, reports were received that OHA was about to file charges against various ALJs seeking their removal from government service on the basis that they had not achieved a certain disposition rate. At a meeting held in New Orleans, the Association inquired of the Associate Commissioner as to the reliability of such reports but he denied their veracity.

In April 1982, charges were filed with the Merit Systems Protection Board (MSPB) against several ALJs seeking their removal as ALJs on the basis of their failure to achieve an acceptable level of performance in the number of decisions they issued per month. Three of such Judges charged called on the Association to intervene in the proceedings on their behalf. The Association attempted to intervene on behalf of its members on the basis that the issues involved in the case would directly affect the other ALJs in DHHS, but the Association was denied status as a party and has been permitted only to file amicus briefs at such time and on such issues as determined by the Judge hearing the case. One of the cases has been disposed of by the charged ALJ's acceptance of retirement status. The other two actions pending are MSPB Case Nos. HQ75218210014 and HQ75218210015.

A recommended decision was recently issued by the ALJ hearing one such case finding good cause for the removal of an ALJ on the sole basis that he failed in a given period of time to render decisions at the rate of approximately two-thirds of the national ALJ average monthly disposition rate. Although the decision is only a recommended one and must be accepted by MSPB before it is a decision of MSPB, the agency by and through its management officials has freely circulated copies of the recommended decision to many ALJs throughout the country and made it the topic of discussion at several official meetings.

As things now stand in OHA, the ALJs have every reason to believe they are being subjected to a rating and evaluation system by their agency, that a standard of performance has been established for them by the agency and a quota in numbers set. The fact that the agency has filed charges against certain ALJs and have officially circulated the recommended decision makes it abundantly clear that the SSA has adopted a policy of rating and evaluating the performance of its ALJs contrary to the specific provisions of the APA and the OPM Regulations. That this policy is being directed and ordered by the Commissioner of Social Security is evidenced by Commissioner John Svahn's statements contained in a publication entitled "Oasis" (an official publication of the Social Security Administration) in March 1982, as follows:

> " . . . I think the hearings and appeals process is moving in the right direction. Productivity of Administrative Law Judges is coming up a little bit. I think we have a right to expect some standardization among our ALJs around the country, and to expect a certain level of productivity."

If the quotas in numbers were not enough the problem is further compounded by the agency's apparent determination to establish a system of rating and evaluating individual ALJs on the basis of their "decisional defects." In a memorandum issued September 26, 1982, the Associate Commissioner revealed a phase of SSA's operations called the "feedback system." Ostensibly as a second phase of the Bellmon Amendment study, it purports to be a system whereby the individual ALJs studied are advised of their "decisional weaknesses" and provided with "a mechanism for long term improvement." Another part of the memorandum provides for a time table of improvement. Failing improvement within certain steps and after taining and counseling, the memo promises other action will be taken but it is not defined.

It is important to keep in mind that the largest group of ALJs under this so-called "Bellmon Review" are those who are "targetted" Judges because of their high allowance rates.

This memorandum evoked even greater concern among the ALJs in HHS. Association efforts to make the Associate Commissioner appreciate the prohibited nature of these announced actions and to persuade him to take remedial action proved useless. A mailgram was finally sent to the Associate Commissioner officially requesting him to withdraw the memo or correct it and to abandon the announced system. It was sent on November 24, 1982. He did not respond to the mailgram.

Commencing in September 1982, the Association was required to obtain legal advice on the various developments in OHA and in the actions before the MSPB. As matters progressed the Association was required to hire Mr. Elliot L. Richardson of the firm of Milbank Tweed, Washington, D.C. Based upon the legal advice of that firm, the Association filed a civil action seeking injunctive relief from the actions of the agency as described above. (*Association of Administrative Law Judges, Inc.* v. *Margaret M. Heckler, et al.*, Civil Action No. 83-0124, United States District Court for the District *of Columbia*.

The action was filed in January 1983. The defendant agency responded by challenging the authority and standing of the Association to bring such litigation. In March 1983, the Court issued an Order rejecting the defendant agency's challenge to the Association's standing, and a motion for summary judgment by the defendant agency is now pending decision. A pretrial order issued in that case provided the agency would suspend all complained-of actions regarding the "feedback system" of the Bellmon review study and that the agency would not file any charges with MSPB on the basis of "inefficiency" pending further proceedings.

With the background given, it is appropriate to treat in more specific detail the issue of allegations that ALJs have been subject to improper pressure by the Social Security Administration as my first topic upon which I will focus my testimony.

I.--IMPROPER PRESSURES

At present management presusres to influence the number of decisions issued by ALJs each month and the percentage of those cases allowed and denied take many forms. Specific examples of such pressures include the following management practices:

(1) Establishing and maintaining an elaborate and costly statistical tracking system which records individual ALJs performance by personal identifier on a monthly basis, including the number of hearings held per month, the number of decisions issued per month, the number of allowances issued per month, the number of dismissals issued per month and the percentage of allowances per month, all for the purpose of ranking, rating and evaluating the performance of individual ALJs in comparison with national averages;

(2) Using such information as a basis of praising and favoring certain judges who produce a high number of decisions as compared with national averages, without regard to how thoroughly developed, just, fair, well-considered or accurate those decisions might be or how adequately the evidentiary record is developed;

(3) Using such information and statistics in determining a standard of performance for ALJs and whether an individual ALJs performance is acceptable to the agency;

(4) Punishing or disfavoring those ALJs who fail to meet quantity standard or quotas of cases to be heard and decided, by refusing to assign them adequate staff while giving preference to other ALJs in availability of staff and improved word processing equipment;

(5) Making travel authority contingent on scheduling a specified number of cases in a given period of time;

(6) Establishing quantitative standards of performance for professional staff members (attorney advisors) who are charged with the duty and responsibility to assist the ALJ in the preparation of cases and issuance of decisions, contrary to the exempt status that such professionals are entitled to in order to permit them to do a quality job;

(7) Establishing unreasonable and arbitrary quantitative standards of performance for other staff members to whom the ALJ must delegate the function of proper preparation and development of a case file for hearing;

(8) Selecting individual ALJs for special study, evaluation and counseling on the basis of the number of claims they allow, and advising all ALJs that judges who allow more claims than the national average are more "decisionally defective" than judges who allow less claims, and virtually ignoring those ALJs with low allowance rates;

(9)Establishing a rating and evaluation system of ALJs selected under the Bellmon review on the basis of their allowance rates by and through management officials and announcing that management officials would be making determinations as to the overall judicial performance of the selected ALJs, counseling them, advising them in correcting their "defective judicial performance", and taking other action if they do not "improve";

(10) Establishing illegal, unannounced, unauthorized, arbitrary and capricious performance standards for ALJs in terms of average monthly dispositions;

(11) Initiating actions to remove ALJs with the MSPB in violation of the official regulations of the Office of Personnel Management and the APA;

(12) Issuing low production warning letters to ALJs who fail to meet certain levels of production and advising them that further action will be taken if they do not increase their production; and

(13) Advising certain ALJs that they were allowing too large a percentage of claims, and that they must reduce the percentage of claims they are allowing.

The effects of these pressures are obviously adverse. ALJs who have grown tired of the constant state of crisis perpetuated by such improper management pressures are leaving OHA and seeking employment in other agencies that permit them to have the decisional independence guaranteed by the APA. Those who do not have the alternative of leaving and cannot accept the interference visited on them are forced to spend inordinate amounts of time in registering protests to the various management pressures and in attempts to mitigate the adverse effect on the fairness of the hearings they hold and the decisions they issue.

The ALJs who have been charged on the basis of unofficial and illegal standards of performance before the MSPB are exhausting their physical and financial resources in defending themselves. The Association has been required by the intolerable state of affairs to hire attorneys in Washington, D.C. and file action in the United States District Court for injunction and declaratory judgment to prevent the continuance of these improper pressures. The costs to the individual members of the Association charged, and the Association have been great, both in money and in morale.

An independent survey was mailed to 728 ALJs in the DHHS for completion and return in the latter part of 1982. Sixty-nine percent of those ALJs surveyed responded (an unusually high rate of response and indicative of the strong feelings of the majority of the ALJs). Seventy percent of the ALJs indicated they believed there was agency pressure on them to deny cases. Sixty-nine percent admitted that the quality of their decisions had suffered because of management pressures to dispose of more cases. Ninety-two percent disagreed with and opposed any quota or evaluation system by the agency. Seventy-seven percent supported the establishment of an independent administrative review commission, and eighty-three percent supported the concept of a separate corps of ALJs.

The results of this survey totally contradict continuing representations being made by SSA in the past few months that the apparent unrest and dissatisfaction in the appeals process is attributable to only a few dissatisfied or complaining ALJs. Quite the contrary is true.

II.--NON-ACQUIESCENCE

This policy does have an adverse effect on the ability of the ALJs in DHHS to apply the Social Security Act and the Regulations, because it prohibits the ALJs from taking into consideration interpretations of the Social Security Act and the Regulations by the Federal Courts. This policy is not compatible with well established principles of American Jurisprudence. Practically speaking, it results in the relitigation of claims upon remand with unneeded additional cost, and also causes similar cases to be appealed that would not have been had the ALJ been free to apply the law as interpreted by the Federal Courts.

In many instances ALJs are required, in following such non-acquiescence policies to deny meritorious claims that they know will be allowed upon appeal to a United States District Court or remanded for rehearing. The policy permits the SSA to totally ignore the interpretations of the law as announced by the Federal Courts in all but the actual case decided. It permits the agency to continue to enforce its policies and interpretations of the law, even when there is clear indication from the Federal Courts that such policies and interpretations are contrary to the law.

I previously testified before Congress as Vice-President of the Association with respect to the objectionable features of this policy. It adversely affects the ability of ALJs to provide fair hearings for the following reasons:

(1) Such policy prohibits the ALJ from applying the law to the facts of the particular case before him, as interpreted by the Federal Courts in the regions in which he hears cases;

(2) If the ALJ ignores the interpretations of the Federal Court and applies the policy of non-acquiescence, the case will most likely be remanded on appeal to the United States District Court whose interpretations have been ignored with the result that the case is required to be heard and decided twice, instead of once;

(3) If the ALJ ignores the non-acquiescence policy of the SSA and applies the interpretations of the Federal Court to the facts of the case, chances are that on review by the Appeals Council (a body of 14 non-APA members sitting in Washington) his decision will be vacated and the case remanded to him with instructions to retry the case and apply the policy of the SSA to the exclusion of the interpretations of the Courts on that particular issue of law.

The Federal Courts have recognized the difficult position in which this places the ALJ and have indicated the danger of such a policy. In the case of George W. Hillouse v. Patricia Roberts Harris, Secretary of Health and Human Services, Civil Action No. 80-5018, U.S.D.C. Fayetville, Arkansas, the Court recognized the difficulty for the ALJ in stating,

> "The court realizes that ALJs are in an awkward position. They are trying to serve two masters: the courts and the Secretary of Health and Human Services. The task is not easy . . . "

The Court went on to quote from Marbury v. Madison, 1 Cranch 137, 177 (1803):

> "It is, emphatically the province and the duty of the judicial department, to say what the law is."

then added,

> " . . . and the Secretary will ignore that principle at his peril."

The policy of non-acquiescence is also objectionable separate and apart from considerations of the extreme adverse effects it has on the ability of an ALJ to perform the duties and functions of his office. It is also ill-advised and objectionable for the following reasons:

(1) It ignores the rule of Stare Decisis upon which American Jurisprudence is based;

(2) It threatens the balance of powers among the Executive, Legislative and Judicial Branches of the government by permitting the Executive Branch to ignore the laws of the land and the intent of Congress as interpreted by the judiciary;

(3) It denies equal protection of the laws to claimants, since only those with the persistence and financial ability to appeal their cases to the United States District Court receive the benefit of the Court's interpretation of the laws passed by Congress;

(4) It is totally repugnant to the duty and responsibility of ALJs who, as lawyers, members of the bar, and Judges, are sworn to uphold the law of the land as enacted by Congress and interpreted by the Courts;

(5) It results in relitigation of cases at great administrative cost to the American taxpayer; and

(6) It unjustifiably delays claimants in receiving benefits they ultimately are entitled to when the cases reach the Federal Courts, when they should have received justice in the administrative proceedings without the cost and emotional hardship caused by appealing cases to the United States District Court.

III.--RULINGS (POMS)

Recently, the Social Security Administration has issued Social Security Rulings as a method of establishing a single set of standards or criteria of disability to be applied by all components of the Social Security Administration, including the Administrative Law Judges. These Rulings incorporate policies of the Social Security Administration establishing standards of disability not found in the Social Security Act, nor in the officially published Regulations of the Secretary. These rulings are for the most part conversions of the previous Social Security Program Operation Manual System Part 4 (POMS). Whereas those standards and criteria were previously applicable only at the lower levels of determination in the Social Security Administration, the issuance of them as Rulings makes them binding and applicable at all levels.

The POMS contains the standards which led to the "horror stories" of disabled individuals arbitrarily purged from the Social Security disability rolls widely publicized by newspaper headlines such as: "In the New Rush for Budget Savings, a Life is Trampled;" "Death Drops Curtain on Fight to Keep Benefits;" "Government Sued Over Suicide;" "Social Security Pulls Wheelchair Out From Under Some Cripples;" "Life Lost in Social Security Numbers Game;" "Shame! Death by Regulation and Other Social Security Tragedies;" "Witnessing the Worst Thing Social Security Has Done."

These headlines represent only a few of those circulating throughout the country. Congress passed legislation recently to enable the claimants to financially survive while they follow the appeals process and hopefully have their benefits restored, but the new Rulings attempt to assure that such "horror stories" will not be reversed by ALJs in the future.

In several areas these Rulings are substantially more restrictive in defining the elements of disability than the Social Security Act or the Regulations of the Secretary. For example, 20 CFR 404.1520 provides a disabled individual must have a severe impairment which significantly limits his physical or mental ability to do basic work activities. SSR 82-55 specifically lists medical conditions that are deemed to be not severe and not expected to produce symptoms of severe and prolonged pain. Listed impairments include osteoarthritis corroborated by x-ray findings with symptoms of pain and stiffness of lumbar or cervical spine or major joints and minimal findings on physical examiantion, traumatic fracture of a vertebral body with loss of less than 50 percent height of vertebra without significant physical findings or neurologic abnormalities, excision of lumbar disc with no ongoing significant motor abnormalities or significant abnormal physical findings, colostomy with proper function of stoma and nutrition adequately maintained, and IQ of 80 or greater. The list could easily be argued to be arbitrary and artificial, and obviously designed to tighten the definition of disability. In effect they require the ALJ to ignore symptoms of pain, even if significant medical conditions exist.

SSR 82-30 specifically sets out the residual functional capacity which should be found attendant to specified physical conditions. Regulations of the Secretary, 20 CFR 404.1546, specifically provides that the determination of residual functional capacity rests with the ALJ or the Appeals Council. Application of the previously mentioned SSR 82-30 results in the determination being made, not by the ALJ who hears the testimony and reviews the evidence, but by an artificial set of standards predetermined by some unnamed person who concluded that a claimant with certain conditions will always have certain capacities. In effect, the Ruling takes from the ALJ the decisional independence to decide the residual functional capacity.

The above are examples of but a few of the substantive defects in these Rulings. The issuance of these Rulings is also procedurally defective in that the requirements of the APA with respect to the publication of Regulations by agencies have been ignored. The conversion of the POMS to binding Rulings was accomplished without publication for public comment, as required by the APA, and represents a serious erosion of the public participation principle.

Advanced copies were sent to the Association for comment. Inadequate time was given to circulate the proposed Rulings to all officers and members of the Board, study them and reply. Additional time was requested but denied. As a result, the Rulings were published without benefit of any comments or objections the Association or the ALJs might have had. Even had the Association been given more time, the major defect of the procedure in issuing these Rulings was that it deprived the public of its right to oppose such codifications of policy.

CONCLUSION

The fairness of the appeals process in the Office of Hearings and Appeals has been seriously compromised by improper pressures for production at the expense of quality, by improper pressures to deny claims, by enforcement of a policy of non-acquiescence in court decisions unfavorable to the SSA, and by issuance of Rulings which conflict with the Act and Regulations, more strictly define disability, and reduce the discretion of the ALJs.

The question remains, how do we effectively reverse the trend and restore fairness to the system? The Association for its part has in the past attempted to resolve the problems by passing resolutions of protest, doing its best to bring to the attention of the administration the dangerous nature of the management initiatives, and when all else failed, seeking relief in the United States District Court in Washington, D.C. The Association attempted to intervene in the MSPB proceedings as a directly affected party on behalf of all ALJs in HHS, but was denied intervenor status and permitted only to file a brief as "amicus curiae". Now it waits for injunctive relief, which may or may not come soon, if at all. Although these actions by the Association are burdens willingly carried because of the vital principles at stake it is unfair to the Association and the individual ALJs to expect them to remedy these serious problems alone.

Even should the Association be successful in court, there is no guarantee that a court decree will solve the problem for long. Court decrees have been entered before but the agency has found it extremely difficult to comply with the dictates of the court decree, or the specific provisions of the APA, or the official Regulations of the Office of Personnel Management. For that reason, the Association has offered to provide assistance and information to various members of Congress who are considering proposing legislation to create an Administrative Review Commission and other measures to remove the ALJs from the dominion of the agency and restore to them the ability to perform their duties and functions in an atmosphere of decisional independence.

The Association has previously indicated its support for a unified corps concept that would place all ALJs in one unified corps separate and apart from the agencies whose cases come before them. On May 12, 1983, Senator Heflin introduced Senate Bill S.1275 and we are studying the details of that legislation. Our legislative committee is working on the final draft of an Administrative Review Commission Bill pertaining only to the Judges in the Department of Health and Human Services which would establish an independent forum of ALJs in the Department of Health and Human Services. That Bill would separate the Office of Hearings and Appeals from the Social Security Administration and redesignate it as an independent review commission responsible for hearing all DHHS cases. This action would be consistent with the organizational structure in other agencies utilizing ALJs and would incur no additional cost to the government. The status of that proposed legislation is not clear at the time of this presentation, but we have hopes that such measures will find some support and move forward.

Although the APA exists and there are official Regulations of the Office of Personnel Management that would seemingly prohibit what is happening, the sad truth is that the ALJs have no protection. The written provisions of the APA and the Regulations of the Office of Personnel Management seem to have no effect without appropriate legislation to establish meaningful enforcement provisions.

In closing, we would urge this Committee to strongly consider immediate legislative action that will fill the need for protection of the decisional independence of the ALJs in the Social Security Administration from further erosion. It is needed to assure the ALJs that they will be granted the latitude and authority to carry out the duties and responsibilities of their positions as ALJs pending ultimate separation from the agency.

Thank you for your time and attention today.

Respectfully submitted,

Charles N. Bono

Charles N. Bono, President
Association of Administrative
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114 Louvaine Drive
Buffalo, New York 14223
June 1, 1983

Senator William S. Cohen, Chairman
Senator Carl Levin, Ranking Minority Member
United States Senate
Committee on Governmental Affairs
Subcommittee on Oversight of Government Management
SD - 340
Washington, D.C. 20510

Dear Senator Cohen and Senator Levin:

This is in answer to your letter of May 19, 1983 requesting information about my background and experience as an administrative law judge (ALJ) in the Social Security Disability Program. Attached is Exhibit 1 describing my background. You also requested that I appear at a hearing before your Subcommittee in the morning on June 8, 1983 and testify on the role of the ALJ in this Disability Program. I have already made the necessary arrangements for my appearance.

Several events led up to my retirement in December 1982. However, I must initially describe the personal work setting and work perspectives. Generally, personnel in OHA are conscientious civil servants. I particularly have in mind Regional Chiefs (RCALJs) Eugene Doyle, now deceased, and Joseph Chodes, who may now be retired; staff in Buffalo OHA office who assisted me, especially my former staff attorney, Mark Haydu, Esq., and another staff attorney, Bob Lawrence, Esq., my former hearing assistants, Mrs. Betty Baldwin and Mrs. Bernadette Maguda, ALJ Simon J. Nash who frequently supported my suggestions, and Hearing Office Manager (HOM) Charles Allen who worked with me on pre-hearing screening of cases. Staff of the social security district offices in our service area were also extremely helpful on many occasions.

The work perspectives indicate that the mission of OHA has been increasingly difficult. According to OHA Fact Sheet for Fiscal Year 1982, issued in March 1983, 320,680 requests for hearing were filed. This represented a 14% increase over the receipt of similar requests for Fiscal Year 1981. The OHA Newsletter for March 1983 reported that in January 1983, OHA received 28,505 requests for hearing; the ALJs disposed of 26,732 for an average of 34 cases per ALJ; the pending workload increased to 162,539; and the average processing time increased by 7 days to 189 days. Speaking for the Supreme Court on May 16, 1983 in Heckler v. Campbell, 51 LW 1561 at p. 1562, Justice Powell noted that the social security hearing system is "probably the largest adjudicative agency in the western world" as described by J. Mashaw et al. in "Social Security Hearings and Appeals", p. XI (1978). SSA has done a remarkable job in certain areas, such as reducing "legalese" in the Secretary's regulations to simple English. OHA has come up with some innovative ideas in providing ALJs with staff attorneys and new technology when both assist the ALJ rather than the ALJ assisting them. SSA is a unique agency. It affects practically all people in the United States by the social security taxes imposed and the social security benefits paid out. To be credible, it must be fair. However, in my personal view, SSA and OHA have increasingly engaged in practices which created and increased my dissatisfaction with my position as an ALJ so that I ultimately decided to retire. I only speak for myself. I do not think that this is a matter of "good guys" versus "bad guys".

The events leading up to my retirement centered around OHA pressure concerning production, scheduling of hearings, number of adjournments, reconfiguration, and later reversal rates. Inadequate help was a periodic problem with partial reconfiguration and was later intensified with full reconfiguration. Quotas were euphemistically called goals. Prior to any reconfiguration in our Buffalo office, we had a unit or team approach. In the calendar year 1979, I was greatly assisted by Mr. Haydu, my staff attorney, and also by my hearing assistant and secretary with decisional typing done by a typing pool supervised by Mr. Allen. I also did pre-hearing screening of some cases. Under these circumstances, I was able to average over 34 dispositions per month. Parenthetically, in January 1983, the average monthly disposition rate for ALJs was 34 cases, according to the March 1983 edition of the OHA Newsletter. After Mr. Haydu resigned in March 1980 to take a supervisory position in Legal Aid, I had difficulty in securing an equally competent replacement for him. This difficulty was intensified with partial and total reconfiguration.

To understand reconfiguration, one must first understand the duties of the ALJ. He is charged with the responsibility for ensuring that papers have been properly pulled from claims folders and marked in evidence; relevant and material evidence absent from the file is secured; issues in cases are properly determined and framed; necessary parties are joined; special witnesses, such as vocational experts and medical advisors, and special assistants, such as interpreters, are secured; claimants obviously having problems representing themselves, e.g., having mental or language or educational problems, are properly advised of the availability of representation through Legal Aid, Lawyers' Reference Service from the local Bar Association, veterans' organizations, etc.; sufficient time is allotted for the hearing; properly worded Notices of Hearing are mailed out to parties; the medical and vocational evidence in the exhibits is summarized; full and fair hearings are held; the necessary post-hearing evidence is secured and proffered to claimant or, if represented, to his representative; the cases are decided; and the decision is written and issued. The OHA Handbook describes many of these functions as duties of the ALJ. Moreover, many court decisions have held the ALJ responsible for developing a full (documentary and testimonial) record, regardless of the presence of claimant's representative. However, under reconfiguration, all of the aforesaid functions have essentially been assigned to pools except for holding a hearing and deciding the case. While the ALJ has responsibility for the final product, he has no authority over pool personnel. The ALJ can modify the work products submitted to him by the various pools, e.g., he can change the pool writer's decision, he can change the wording of issues in Notices of Hearing, etc. However, in my opinion, because of OHA pressure to schedule a minimum of 50 hearings a month, dispose of at least 40 cases a month, and not grant too many adjournments, the ALJ's participation in these pool-assumed ALJ functions has been significantly reduced. In my last few months in 1982, I stopped submitting my detailed decisional notes to the decision writing pool and I wrote my own decisions. I had found that, in the main, I had to do extensive rewriting when this pool returned the draft decision to me and that my decisional notes had sometimes even been ignored. Needless to say, the writers in the decision writing pool were also subject to a quota which if not met might cause a decision writer the loss of a promotion or increment step. The March 1983 OHA Newsletter reported: "Over the past two years the results in reconfigured Hearing Offices (HOs) have been mixed." While I believe the "production" of my fellow ALJs in my Buffalo office increased during this period, my "production" substantially decreased. I was dissatisfied with the case summaries, development, description of issues, pulling of exhibits, and writing in the pools. I therefore found that I had to perform these tasks more and more myself. I was also holding hearings myself to enable my secretary to do the additional development. I had continued working my usual 60 hour week and I felt I could not work any harder. I finally reached the point where I felt I could not provide a full and complete hearing fair to claimants, government, and taxpayers under these circumstances. However, I must point out that my reaction * of other ALJs. I was quite meticulous about all of the aforesaid ALJ functions, especially development of evidence, adequate hearing time, and decision writing. The importance of the ALJ's duty "to develop a full and fair record" was recently stressed in the concurring opinion of Justice Brennan and in the partially concurring and partially dissenting opinion of Justice Marshall in *Heckler* v. *Campbell*, *supra*. On April 11, 1983, I mailed a letter to Senator John Heinz, Chairman, Senate Select Committee on Aging, summarizing my experience in December 1982 in prehearing screening of cases. This experience suggested that the SA and SSA were failing to secure vital documentation, namely, medical assessments from claimants' treating physicians about claimants' abilities to do basic work activities. A copy of this letter is attached and marked as Exhibit 2.

You also requested me to discuss the effect on ALJ decision-making of SSA's policy of non-acquiescence in certain decisions rendered by the Federal Circuit Courts of Appeal and of SSA's adoption of Program Operations Manual System (POMS) in Social Security Rulings (SSRs). The first procedure presumably is to promote a national social security disability program rather than have different regional programs. The second procedure is to ensure that all administrative levels in the State Agency (SA) and SSA, from the initial through the Appeals Council (AC) levels, are applying uniform disability standards. With reference to the doctrine of non-acquiescence, does the SSA have the constitutional or statutory power to pick and choose which court decisions it will and will not follow? Furthermore, if a private individual does not have such power, what lesson about respect for law does such government policy impart to such individual? Under the doctrine of non-

*to reconfiguration may be quite different from the reaction acquiescence, SSA directs its staff to ignore certain court decisions by its adoption of SSRs which are binding on all SSA personnel, including ALJs. This policy is illustrated in SSR 82-10c (C.E. 1982) involving Finnegan v. Matthews, 641 F. 2d 1340 (9th Cir. 1981) and in SSR 82-33c (C.E. 1982) involving Campbell v. Sec. of HHS, 665 F. 2d 48 (2nd Cir. 1981). SSA also participates in determining which decisions to appeal and not to appeal. Thus, it did not appeal the Finnegan decision but appealed the Campbell decision to the United States Supreme Court which issued its decision on May 16, 1983. ALJs are officers of the court and also swore that they would faithfully carry out their duties. However, which law should they apply - court law or SSA law? The SSA in Finnegan had to enforce the court mandate in that specific case but in other factually similar cases, it is holding contrary to Finnegan and is requiring ALJs to follow its policy.

The SSA's adoption of POMS in SSRs raises questions as to the procedure employed in such adoption. Before the incorporation of POMS into SSRs, should POMS have been the subject of notice(s) of proposed rulemaking? In this way, the public would have been afforded an opportunity to comment on such proposed incorporation which the public was denied by the procedure followed by SSA. However, the Secretary has pointed to the Administrative Procedure Act (5 U.S.C. 553) as not applying rulemaking procedures to matters relating to benefits. Despite this exemption, the Secretary was willing to issue such notice except if, in his (her) judgment, the delay from such procedures would impair attainment of program objectives or have other disadvantages that would outweigh benefits of public comment before issuance of a rule. Federal Register, Vol. 47, No. 120, 6/22/82, p. 26861. In my opinion, some of these POMS converted into SSRs narrow ALJ discretion. Thus, SSR 82-55 (C.E. 1982) describes 20 examples of non-severe medical impairments involving nine body systems. If a claimant has one or more of these impairments, whatever their actual affect on the individual claimant, the claimant is deemed not to have a severe impairment. Absent a severe impairment, the claimant would be deemed not disabled and the disability inquiry would cease, according to the sequential evaluation provided by sections 404.1520 (a) and (c) and 416.920 (a) and (c), Regulations Nos. 4 and 16, respectively. Thus, an airline pilot or truckdriver in interstate commerce who becomes blind in one eye and has a best corrected visual acuity of 20/40 in the better eye without significant restriction of visual fields may not be able to return to his past relevant work as a result of his visual impairment but will be deemed non-disabled because he would be automatically held to have a non-severe impairment. SSA holds that under these circumstances, the claimant's inability to do his past relevant work arises from both the specific demands of the work and the impairment rather than the impairment itself. What other work such a claimant could do in light of his age, education, work experience, and residual functional capacity (RFC) would be irrelevant since SSA concludes that the claimant would clearly be able to do basic work-related functions in most jobs and these four factors themselves would then also be irrelevant. Similarly, if a claimant had different multiple body system impairments, theoretically all of the aforesaid 20 examples, each of which was considered non-severe under SSR 82-55, the combination of such non-severe impairments cannot by law (SSR 82-55) produce a severe impairment. It is interesting to note, however, that where a severe and a non-severe impairment are combined, the combined effect of all impairments must be considered in assessing RFC. While SSR 82-55 states that RFC is not assessed in cases of non-severe impairment, the definition of non-severe impairment deals with physical and mental abilities to do basic work activities. Sections 404.1521 and 416.921, Regulations Nos. 4 and 16, respectively. Under these circumstances, a medical assessment from the claimant's treating physician describing the claimant's physical and mental abilities to do basic work activities as part of a comprehensive medical report would be very important to disability evaluation but its receipt is frequently neglected by the SSA and SA. See sections 404.1512 and 404.1513, 416.912 and 416.913, supra. I made this point in Exhibit 2 with reference to the SSA's continuing disability investigation (CDI) and raised questions as to the fairness of the disability evaluation procedures of SSA and SA. Attached are copies of the former and current SSA evaluation forms marked respectively as Exhibits 3 and 4. In my opinion, the current forms (Exhibit 4) may indicate a further intention to reduce the impact of non-government physicians, such as treating and consultative physicians, and thereby increase the role of government (SA and SSA) physicians on the determination of severity and the assessment of RFC.

Other developments have further affected the independence of the ALJ. The Medical-Vocational Guidelines known as the "grid" system in Appendix 2, Subpart P, Regulations No. 4, determine the decision in cases of exertional limitations after the claimant's age, education, work experience, and RFC elements have been factored into the "grid" by the ALJ. However, the automatic "grid" disability conclusions are inapplicable in non-exertional cases or in combined exertional and non-exertional cases where a finding of disabled is not possible. In such cases, administrative notice of the existence of sedentary, light, and medium occupations would be irrelevant since these occupations are geared to exertional requirements. Non-exertional cases involve mental, sensory, or skin impairments or postural, manipulative, or environmental restrictions. Section 200.00, especially (e), Appendix 2. It is interesting to note that in the Campbell case, the Second Circuit Court of Appeals described the findings in a medical assessment of claimant's ability to do basic work activities reported by a physician whom claimant had seen several times between February 1980 and the summer of 1980 at the request of the New York State Workers' Compensation Board. This assessment clearly indicated that the claimant had significant postural restrictions in that she could continuously stand for only 30 minutes, sit for only 30 minutes, and alternately stand or sit at one time for one hour. 665 F. 2d 48 (1982). Claimant's history of musculoskeletal impairment with subsequent laminectomy was described by the Second Circuit. In his concurring opinion in the recent United States Supreme Court decision on the Campbell appeal, Justice Brennan asserted that the ALJ had "failed to inquire whether factors besides strength, age, or education, combined with her other impairments," rendered the claimant disabled. Justice Brennan added: "Apparently such factors could have been dispositive of the case before us. The Secretary has since determined that respondent is in fact disabled,..., based on consideration of severe emotional complications not explored at all by the Administrative Law Judge in the hearing... ."

In his associated Footnote, Justice Brennan observed that the ALJ had noted that the claimant had "marked difficulties in sitting, standing, and walking" and had "found that her back disorder was 'complicated by a severe emotional overlay.'" 51 LW 4561, 4565. Thus the Supreme Court's upholding of administrative notice of available light jobs which the claimant could do based on exertional limitations evaluated in the "grid" system may have ignored the significant non-exertional, postural and mental restrictions in this case. With the inclusion of the latter restrictions, vocational expert (VE) testimony would have been appropriate rather than resort to the exertional-oriented "grid" system. However, use of VEs, extra precautions in ensuring adequate representation for claimants (Campbell had "little education and limited fluency in English" and was ultimately found to have severe emotional impairment), and detailed questioning of claimants, especially unrepresented claimants, require considerable time and work for the ALJ. Can the ALJ meet these needs in light of SSA and OHA quotas or "goals" on production, adjournments,and scheduled hearings?

Bellmon Review of ALJs having reversal rates over 70% as compared to the reversal averages of their peers also affects the independence of the ALJ. The ALJ should not be concerned with his or her reversal or affirmative rates when the ALJ is deciding individual cases, many of which are in the "gray" area. While I believe the decisions of ALJs should be subject to increased "own motion" review by the AC, this should be on a spot-check basis, regardless of the reversal or affirmation rates of the ALJs. If the "spot-check" review shows serious legal deficiencies in an ALJ's evidentiary, hearing, or decisional work, these deficiencies should be brought to the ALJ's attention when the AC reverses and remands the ALJ decision to the specific ALJ. Intensive "own motion" review by the AC of specific ALJs may be warranted when such ALJs persist in repeating serious legal deficiencies. However, why base such review merely on reversal rate? For special "own motion" review by the AC, why not then also factor in other elements, such as extremely high affirmation rate (many affirmations are not appealed), length of hearing (some are exceedingly brief as has been noted time and again by reviewing courts), nature and amount of documentary evidence in exhibit file, presence of representation for illiterate or poorly educated or linguistic or mentally impaired claimants, use of expert witnessess, etc.? In other words, I suspect that Bellmon review as carried out by SSA and OHA has been one-sided, against claimants. I believe that the ALJ reversal rate has declined since implementation of Bellmon review. The latest overall reversal (allowance) rate of ALJ decisions was 50.6 % for January 1983 whereas the similar ALJ rate for Fiscal Year 1982 was an overall 53 % of which 58 % was title II disability and 50 % was concurrent title II and XVI (presumably disability). See OHA Fact Sheet for Fiscal Year 1982 - copy marked as Exhibit 5. The relevant reversal rate comparisons should be based solely on title II disability decisions and concurrent title II and XVI disability decisions of ALJs over the past three years. "The Bellmon Report", dated January 1982, of the Secretary of HHS to Congress, reported several interesting test findings. In the sample 3,600 recent ALJ disability decisions, the ALJ allowed 64 % while the AC, applying ALJ standards, allowed 48 %, and SSA's Office of Assessment (OA), applying SA standards, allowed only 13 %. Presumably, the ALJs in January 1983 applied the same standards as the SA since the POMS had been incorporated into legally binding SSRs. Nevertheless, the ALJ overall allowance (reversal) rate was 50.6 %. Thus, although the same standards were presumably being used by the SA and the ALJ, the ALJ allowance (reversal) rate presented about the same increase above SA determinations as in the aforesaid sample using different standards. "The Bellmon Report" also noted that in-person information before the ALJ and additional medical evidence submitted after the SA decision significantly affected the ALJ allowance (reversal) rate. Thus, the original ALJ allowance (reversal) rate of 64 % dropped to 46 % when the in-person information was removed from the case and further dropped to 31 % when all evidence added after the SA decision was deleted from the sample folders. I believe that recent legislative changes provide for the personal appearance of the claimant before the decision-maker at the reconsideration level. However, the documentary evidentiary input at the initial and reconsideration levels leaves a lot to be desired as revealed in my pre-hearing screening of cases in 12/82. (See Exhibit 2.) Parenthetically, I was informed by the Chief Judge of OHA in early December 1982 that I was scheduled for Bellmon Review because my reversal rate had exceeded 70 % for a six month period. I informed the Chief Judge that I was retiring effective December 31, 1982. He then doubted whether my decisions would be placed under Bellmon Review. My reversal rate for calendar year 1982 was 69.5 % in comparison to my approximate 48 % reversal rate for calendar year 1979. I suspect that the increase in my reversal rate in large part was due to the CDI program with its poor evidentiary input and my substantial documentary supplementation.

A further and new development affecting the traditional independence of the ALJ is the experimental adversary procedure where the SSA will have a representative presenting its case when the claimant is represented by a lay (including apparently spouse, parent, or child) or legal representative. Section 404.965, Regulations No. 4. The SSA representative will also be charged with the development of the case, whether or not such development is favorable or unfavorable to SSA or claimant. This procedure affects the traditional "three-cornered hat" role of the ALJ and transforms the traditional non-adversary social security hearing to an adversary social security hearing.

The SSA incorporates the three traditional legislative, executive, and judicial powers without appropriate checks and balances. Its legislative powers are represented in its formulation of regulations and SSRs. Potential problems arise when it changes fundamental and customary concepts, such as individualized determinations for "grid" determinations, non-adversarial hearings for adversarial hearings, unit (team) approaches into pool approaches as in reconfiguration, the individual disability claimant into a disability class as in binding SSRs defining non-severe impairments, public hearings after notice on proposed regulations into the incorporation of POMS into SSRs as legally binding as regulations without notice and public hearings. While the SSA undoubtedly requires considerable discretion in filling in the gaps of the Congressional enactment, are all of the aforesaid actions within the scope of the delegation of legislative power by Congress to the Secretary in the Social Security Act and its amendments? SSA executive powers involve the administration of the social security program pursuant to the Social Security Act and its amendments. Its judicial powers involve the resolution of social security claims. After initial and reconsideration determinations by SAs with SSA participation, quasi-judicial powers are concentrated in the SSA's OHA with ALJs hearing and deciding these claims *de novo* on appeal generally from reconsideration determinations and the AC deciding cases on appeal or on its "own motion" review from the ALJ. SSA is in reality a party to the determination or hearing before itself or before the SA, the ALJ, and the AC. OHA is a subordinate agency within SSA and should, like Caesar's wife, be above suspicion. However, OHA's production and reversal quotas, its stress against adjournments allowed by ALJs, its quota for scheduling of hearings now pegged at a monthly minimum of 50 raise questions as to the fairness of the hearing procedure. A recent attempt through proposed legislation to eliminate the traditional *de novo* hearing of the ALJ and replace it with a hearing where the record was closed after a face-to-face hearing and determination at the reconsideration level adds fuel to the fires of suspicion (see H.R., section 5). Needless to say, the face-to-face reconsideration hearing would be before a dependent SA or SSA employee.

Can the SSA and OHA reconcile the determination of a massive volume of claims with individual justice? Does individual justice require an independent ALJ corps and, if so, are the ALJs becoming an endangered species by the policies and practices of SSA and OHA? The social security program is so vital to our country that the reconciliation of mass claims with individual justice must be achieved. In my opinion, individual justice requires an independent decision maker, such as the ALJ, at some administrative level. However, I believe that the aforesaid policies and procedures are affecting traditional ALJ independence although I am sure that there are opinions to the contrary. SSA and OHA wish to have social security cases decided quickly. They also look for certainty, consistency, uniformity, and predictability in decision making with no conflicts between the ALJ hearing level, on the one hand, and the prior administrative SSA and SA initial and reconsideration levels, on the other hand. They also wish to administer a uniform national rather than a diverse regional program, with contradictory judicial decisions detracting from this objective. These goals are undoubtedly praiseworthy. However, if the means employed jeopardize the *just* accomplishment of these goals, the substance of such goals is fatally flawed.

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I do not believe that there is any one solution to these problems nor are the solutions easily attainable. I am also sure that I do not have all the answers. However, I have a few suggestions as follows:

(1) The appointment of a special committee composed of an equal number of representatives from each of the three branches of the federal government plus representatives of citizen organizations and outstanding legal scholars and attorneys learned in administrative and constitutional law to review the concentration of governmental powers in the SSA and the possible separation of OHA, the quasi-judicial branch of SSA, from SSA and possibly from the Department of HHS.

(2) Reform in the social security claims determination process beginning from the base of the administrative pyramid, initial determination, and continuing through reconsideration determination. These levels should be required to participate actively in the full documentation of files without closing of such files after reconsideration. These levels have free access to resources which they seldom pursue, such as files from Worker's Compensation Boards, Offices of Vocational Rehabilitation, private insurance companies which are veritable gold mines of medical information. They should also inform claimants of available legal and lay representation resources so that knowledgeable claimant assistance can begin from the beginning and not from the ALJ level. Claimants with mental, language, or educational problems should be encouraged at these levels to use these resources. Under such circumstances, less cases might be appealed to the ALJ level and if they were so appealed, they would be well documented and require less development at the ALJ level.

(3) Establishment of legal internship programs involving law schools throughout the country and OHA to assist ALJs in the performance of their duties and perhaps even in SSA's claims adjudication at initial and reconsideration levels. Law school students would receive law school grades and credit for such participation.

(4) Accelerated judicial review from conflicting District Court and/or Circuit Court interpretations of the Social Security Act and Regulations with the requirement that SSA and HHS proceed with such appeal rather than rest on the doctrine of non-acquiescence.

*

As I was in the process of retiring last year, many cartons arrived in our OHA office. These cartons were later opened and their contents assembled. They were Wang machines, including, I believe, word processors and printers into which were programmed "canned" paragraphs for ALJ decisions - introduction, issues, law, findings, and decisional paragraphs - with spaces for insertions. Was "ALJ Wang" my replacement?

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* Inadvertently omitted was (5) Mandatory Notice(s) of Proposed Rulemaking before any SSR can be valid.

In conclusion, the overall OHA and SSA setting and trends, as I have described, rather than any one factor, finally persuaded me to retire.*

Very truly yours,

Jacob Frieder

Encls.

*As for the actual date of retirement, I relied on government computations of my service computation date and estimated annuity. I have been receiving annuity payments far less than originally estimated and am still awaiting my annuity resolution.

(Subcommittee note: Exhibits referred to are retained in the Subcommittee's files.)

Testimony of Victor G. Rosenblum Before the Subcommittee on Oversight Management Committee on Governmental Affairs. U. S. Senate, June 8, 1983.

Mr. Chairman and members of the Committee, my name is Victor G. Rosenblum. I've been a professor at North-Western University since 1958 and am a past chairman of the Administrative Law Section of the American Bar Association and a current vice president of the American Judicature Society. Although my testimony before you is not likely to be incompatible with positions of the ABA and AJS, I should make it clear that I am testifying today in behalf of no one but myself. My views on administrative law judges have developed in the course of studying and teaching about the administrative process for some twenty five years.

Though my experience is predominantly academic, I hope that such ties as having been a staff counsel with the House of Representatives Committee on Government Operations, service as a member of the then Civil Service Commission's Advisory Committee on Administrative Law Judges, service as a member of the advisory committee to the National Institute on Law Enforcement and Criminal Justice, and consulting work with and current membership on the Administrative Conference of the United States have provided ties with the "real" world that will keep my testimoney from being purely academic.

I would like to focus on issues affecting appointment, tenure and roles of Administrative Law Judges. I believe that any plan, policy or program that re-introduces political influence over the decision of Administrative Law Judges embodies an idea whose time has long since passed. One of the great strengths of our governmental system is our capacity to direct and confine political controls to those areas and institutions that can be nurtured and enhanced through them. The legislative branch of our government offers a prime illustration of constructive political controls. At the same time, the Judicial branch of our government has acquired its stature because it is recognized and accepted that politics can play no part in the decisions of our Federal judges.

That the administrative process is a hybrid of legislative, executive and judicial roles in its totality has never meant that there are not particular functions within the agencies that cannot be identified as legislative, executive, or judicial. The Administrative Law Judge performs a judicial function that parallels within the administrative process the roles of our other Federal judges within the broader governmental process. That judicial office has been and must continue to be free from political pressures and influences. Reinstitution of politics as a means for controlling adjudication would constitute repudiation and degradation of the bonafide reforms of recent decades.

Congress asserted the importance of the principle that adjudication should not be subject to politicization when it adopted the Administrative Procedure Act in 1946 especially Section 11 of the Act dealing with hearing examiners. The language of § 3105, § 7521 and § 5362 could not have been clearer or more forthright in this respect: "Hearing examiners shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as hearing examiners. A hearing examiner appointed under Section 3105 of this title may be removed by the agency in which he is employed only for good cause established and determined by the Civil Service Commission on the record after opportunity for hearing. Hearing examiners appointed under Section 3105 of this title are entitled to pay prescribed by the Civil Service Commission independently of agency recommendations or ratings...."

By making salaries independent of the employing agency's recommendations or ratings, and especially by appointing hearing examiners for life with removal only for good cause as determined by the Commission -- now by the Merit Systems Protection Board, Congress established standards for dealing with ALJs that veered from those for dealing with many other agency employees; but Congress felt these exceptions and changes were necessary to insure impartiality.

The American Bar Association launched a vigorous campaign in 1947 to watchdog the Commission's work and insure the success of the new system under the APA. "Of personal and professional interest to many lawyers are the steps taken to implement the provisions of the Administrative Procedure Act to secure impartiality, qualifications, and independence and security of tenure, on the part of the Hearing Examiners for the agencies." (ABA Journal 33:1, Jan. 1947).

The ABA hoped that the final selection "will be of men who are free from bias, ideological preconceptions, partisan fealty, subservience to 'pressure groups', habits of unfairness, disregard of the true values and weight of evidence." (ABA Journal 33:213, March, 1947).

On Capitol Hill, the chairman of the Senate Committee on the Judiciary, Senator Wiley of Wisconsin, insisted also that appointments be non-partisan, with choices based on fitness rather than on "a narrow partisan and ideological basis, with the selection largely limited to present examiners and agency staffs, with all members of other parties largely excluded, irrespective of their possibly superior qualifications." (ABA Journal 33:422-423, May, 1947).

An excellent overview of Congress's intentions for hearing examiners under the APA was given at the time by Professor Morgan Thomas of the University of Michigan, in an article on "The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process" published in 1950 in the Yale Law Journal (59:431-75). Professor Thomas noted that:

> Integral to the new procedure was the creation within each agency of a special corps of hearing examiners independent of agency control or influence.... The main change lay in the new independence which hearing examiners were to have. To that end they were explicitly made free of supervision by the investigatory, prosecuting, and administrative staffs of their agencies.... Within each agency, cases were generally to be rotated so that agency influence could not be made effective through assignment of cases. Moreover, the Civil Service Commission was entrusted with the broad powers which agencies themselves had previously exercised over their trial examiners. Thus the Commission was given authority to prescribe examiners' grades and salaries and to pass on promotions independently of agency ratings or recommendations. An examiner could be removed only if "good cause" were established at a Civil Service Commission hearing.

The Report of the Committee on the Judiciary (Report of the Senate Committee on the Judiciary on Sen. Rep. No. 752, 79th Congr., 1st Sess. [1945], reprinted in Sen. Doc. No. 248, 79th Cong. 2d. Sess. 215 [1946]) explained concisely the reasons for these provisions of Section 11:

> "The purpose of this section is to render examiners independent and secure in their tenure and compensation. The section thus takes a different ground than the present situation in which examiners are mere employees of an agency... Recognizing that the entire tradition of the Civil Service Commission is directed toward security of tenure, it seems wise to put that tradition to use in the present case."

It's interesting to note that Congress had been presented with and rejected other proposals for dealing with hearing examiners. One of these proposals included specific terms of office for examiners. Under a plan proposed by the Attorney General's Committee on Administrative Procedure, the hearing examiner would have held office for seven years and then would have to be renominated by the agency and reapproved by the Office of Federal Administrative Procedure. (Final Report of the

Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Congress, 1st Session, 1941, p. 46-7)

Professor Thomas explained that in rejecting proposals like this, a concept that was predominant in congressional thinking was "that the guarantee of security of tenure by the Civil Service commission was the appropriate way to ensure that the examiners would be free from subservience to their agencies."

As Justice White pointed out in the Supreme Court's decision Butz v. Economou, 438 U.S. 478, 1978, at 511-13 "judges have absolute immunity not because of their particular location within the government but because of the special nature of their responsibilities.... We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such administrative adjudication should also be immune from suits for damages.... There can be little doubt that the role of the modern Federal Hearing Examiner or Administrative Law Judge within this framework is 'functionally comparable' to that of a judge."

Although the Butz case focused on the issue of immunity from suits for damages, Justice White's opinion stressed the independence and integrity of Administrative

Law Judges' decision as justification for immunity:

> "More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work .... and because they were often subordinate to executive officials within the agency.... Since the securing of fair and competent hearing personnel was viewed as "the heart of formal administrative adjudication", ...the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners... When conducting a hearing under § 5 of the APA, a hearing examiner is not responsible to or subject to the supervision

> or direction of employees or agents engaged in the performance of investigative or prosecution functions for the agency.... Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate... Hearing examiners must be assigned to cases in rotation so far as is practicable.... They may be removed only for good cause established and determined by the Civil Service Comission after a hearing on the record.... Their pay is also controlled by the Civil Service Commission.
>
> In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women."

Although no sitting federal judge would be likely to testify before you about how he or she would react to political invasion or ALJs' independence of judgment, it would be reasonable to predict that judicial review would have to take on stricter, lengthier and more detailed standards of scrutiny. If a reviewing court can't have the kind of trust Justice White expressed in the integrity and independence of today's ALJs, it would have to probe more deeply and extensively in order to be satisfied with the fairness and substantiality of the record before it. In short, in addition to adverse impacts on recruitment and morale, intrusions upon ALJ decisional independence could also spur a return to suspicion and hostility in court-agency relations that were hallmarks of the early 1930's.

I urge the distinguished members of this Subcommittee to preserve and protect the gains made in our administrative system by the function of fair, impartial and nonpolitical Administrative Law Judges. Subjecting these judicial officials to political controls in the 1980's would unfortunately say to the nation that "nothing recedes like success." We can improve decision making mechanisms through enhancement of knowledge and decisional integrity; we can only corrode or destroy them by subjecting Administrative Law Judges' decisional independence to political controls.

Senator COHEN. Our final witnesses are Elena Ackel from the Legal Aid Foundation of Los Angeles and Paul Bender, a constitutional law scholar from the University of Pennsylvania, who will testify on the agency's policy of nonacquiescence.

Ms. Ackel, why don't you begin. I know you have been sitting here a long time, but try to summarize your statement. If you have a prepared statement, it will go in the record. We do have a lot of information you supplied us, and that will become part of the record. Just perhaps talk informally.

TESTIMONY OF ELENA H. ACKEL, LEGAL AID FOUNDATION OF LOS ANGELES, LOS ANGELES, CALIF.; AND PAUL BENDER, PROFESSOR OF CONSTITUTIONAL LAW, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, PHILADELPHIA, PA.

Ms. ACKEL. OK. I will summarize my statement. My name is Elena Ackel. I am senior attorney in the Watts Office of the Legal Aid Foundation of Los Angeles. I am also one of the attorneys in the case of *Lopez* v. *Heckler,* which was referred to by Mr. Hays. That lawsuit has two parts. One of them challenges the Secretary's refusal to follow a medical improvement standard in the ninth circuit as enunciated in two ninth circuit cases. The other part of it challenges on a nationwide basis the Social Security Administration's refusal to follow circuit court decisions with which it disagrees.

There are two kinds of nonacquiescence. Before, you alluded to the formal nonacquiescence, where they issue a social security ruling. There has been about 10 of them, which indicate they're not going to follow court decisions. The two worst, or rather most pernicious in that they affect a large number of people, are the formal nonacquiescence decisions in *Patti* and *Finnegan.* But that's only the tip of the iceberg, because there are a lot of other opinions, circuit court opinions, that they—SSA—do not acquiescence in, and they don't issue formal rulings.

We are challenging in our lawsuit both the policy of formal nonacquiescence and the policy of informal nonacquiescence. In a recent class action in the State of Washington, both types of nonacquiescence were challenged. In the State of Washington case the court ruled SSA had to follow *Patti.* The court also ruled against Social Security with respect to two forms of informal nonacquiescence. One of them was Social Security's refusal to follow in the ninth circuit in a case called *Griffith* v. *Weinberger.* That case held that alcoholism and drug addition, in and of themselves, if severe enough, would warrant the granting of disability benefits. The POMS is entirely to the contrary. So consequently, after the ninth circuit decision, Social Security just totally ignored it and didn't implement it in the ninth circuit by changing the POM which is followed in the first and second stage of review.

Administrative law judges and the Appeals Council have been told in their Hearings and Appeals Manual that they are not to follow court decisions which conflict with the Secretary's interpretations of the law, unless the Secretary, in writing, specifically instructs them to do so.

So what you have is a system where the court comes down with a favorable decision which has widespread application, but the Secretary doesn't appeal, doesn't even issue a "formal" nonacquiescence ruling. As a result no other person in the circuit gets the benefit of those particular court rulings.

The one that we are particularly concerned about, because it has a broad impact in the ninth circuit, is the medical improvement standard that I referred to in *Finnegan* and *Patti*. Social Security came up with estimates that those decisions affect about 70,000 people. Our contention is that the correct standards to apply in a review of continuing disability are, as a result of those court decisions, the medical improvement standards enunciated in *Patti* and *Finnegan*.

I have set out in the submitted written testimony and attachments our legal bases for concluding that that is the correct decision, but just on the principles of basic fairness, how many times does the court have to decide what the law is, and even aside from the constitutional principles, you have a situation where the court has decided, in five circuits, that the medical improvement standard applies, and Social Security just ignores it. Combined with this is the practice of not appealing. There are 10 formal nonacquiesence rulings. In each of those, SSA makes a decision about whether to appeal or not. The only case in which Social Security appealed has been *Campbell* because Social Security thought that there was a reasonable possibility of prevailing. In other cases as where circuit court decisions have been all against them on the medical improvement standard, Social Security in every single instance has decided not to appeal.

So court decisions come out, both in medical improvements, and on other issues. An example is the *Boylan* decision in the sixth circuit: there's been a similar decision in the ninth circuit. These cases involve minor childrens' rights to survivors' benefits. SSA has refused to follow these decisions. It's most likely the Supreme Court, which they admit that they are bound by, is going to rule against them. So they make a decision not to appeal these decisions.

On the *Finnegan* decision, which concerns SSI recipients who were grandfathered in from State programs. Social Security set in a memo the reasons they were not appealing—that is because the government's position was weak in that the person's condition hadn't medically improved, and the person still might be disabled, and particularly because SSA wanted to limit that holding, and SSA wanted it, in other words, not to apply to any other similarly situated person. We have seen that over and over. I think that when you combine the two elements—the fact that they don't follow court decisions and they don't appeal, Social Security's policy has a particularly tremendous impact on the people that are being cut off of social security disability.

Social Security's response to criticism is that the IRS does it. But that response shows a lack of understanding about what the IRS does. The IRS, true, does have nonacquiesence rulings, but what that means is, if there is a decision in the ninth circuit with which the IRS disagrees, IRS issues a nonacquiesence ruling. The ruling says that in other than the ninth circuit, IRS won't follow that, but

IRS will follow it in the ninth circuit. Social Security does not do that. We have five circuits that have applied the medical improvements standards. Social Security doesn't follow the standard in any one of the medical improvements circuits.

In our *Lopez* case, Social Security's primary reliance has been on what the IRS has done. Mr. Hays referred to the *Lopez* case. There was a preliminary injunction hearing in that case on Monday. The judge has not issued a memorandum, but said from the bench that he was going to issue a preliminary injunction with respect to all the States in the ninth circuit to require the Secretary to apply a medical improvements standard in all future review cases. But he said it was just beyond his administrative capacity to deal with Social Security's nationwide policy of nonacquiescence. He referred to the Secretary when he said, "The word that came to mind in describing your conduct is 'arrogance,'" and described the attitude toward the recipient as "the recipient be damned," saying that if they get to the district court, there and then is the only place they can have the correct law applied.

We've heard a lot today about different standards being applied at the lower levels and at the ALJ levels, but we have a situation, nonacquiescence, that even if the person is able to persevere 1 year to 1½ years, in order to get to the ALJ, even then, the rule of law for the circuit is not applied. And we have two recent instances, without which we submitted a declaration to the court, where the ALJ felt constrained to follow the *Patti* decision. One was reversed and one was remanded. I have spoken with other administrative law judges. They say they want to follow the decision, but they have to think of the claimant. If they follow circuit decision, it is a red flag, and that case will be reversed, and the person will be without money in the meantime, because aid paid pending stops at the administrative law judge level.

Another argument why nonacquiescence is necessary is, that otherwise, Social Security wouldn't be able to urge that other courts or courts in the other circuits reverse the earlier decision, as wrongly decided. That simply isn't true. There's 5,000 cases annually where disability terminations are appealed to the district court. If they were required to follow *Finnegan* and *Patti*, there would still be cases where the person's condition had medically improved, and they were correctly cut off.

When those cases went to court, the Secretary could argue, this person's condition has improved, so they are not entitled to disability, and even if it hasn't, *Patti* is an incorrect standard. And in that instance, the court would have to address that question in order to make its decision. There would be any number of new cases in which they could raise the issue.

Last, I'd like to address, particularly with respect to the *Finnegan* and *Patti* decision, the tremendous harm that the nonacquiescence policy has had as reflected in our most recent set of supplemental declarations. We submitted the declarations, and I have submitted to you the digest of those, of nine surviving widows of people that have died of heart attacks, after they had been told that they were going to be cut off from disability.

We've also submitted the declaration of J. Michael Criley, the head of cardiology at Harbor UCLA Medical Center, telling what the stress of that type of cutoff would cause in a person with cardiac problems.

Also, when you think that someone goes to the ALJ stage, they could have their benefits terminated. They would be left with not only no funds, but also no medicare, and in California, no Medi-cal, which they need to pay for their medicines. And heart drugs often cost over $100 a month. So they're left totally without funds and without medical benefits from which to pay for the treatment that they need.

In conclusion, I'd just like to say that from this nonacquiescence policy we have two really serious harms. First, Social Security just completely ignores basic fairness and the legal principles of this country; and second, as a result, thousands, tens of thousands, of Americans have been caused to lose their last tether to dignity and survival.

Thank you.

Senator COHEN. Thank you very much, Ms. Ackel.

There is apparently a pattern of nonacquiescence in the rules of this committee as well. You mentioned the word "arrogance." I would go further in some respects and say, "contemptuous." They exhibited a certain contemptuousness toward this committee a year ago, inasmuch as accusing us of being demagogues.

Second, they excluded our staff from a press conference yesterday. Unlike the forum we have today with members of the SSA here making notes about the proceedings here, we were excluded from a public forum yesterday.

Third, we did not receive any SSA testimony until 8 o'clock this morning, even though we usually require 48 hours for having testimony, so we can review it and ask questions, hopefully, intelligent questions, to see if we can't arrive at some measure of the truth or at some measure of what is fair, reasonable, and responsible.

Yet on those three examples that I can cite, this committee has just sort of been treated as someone who's interested in getting up on a podium and flagellating an agency that has set out to carry out a congressional mandate that may not even exist in the way it's being interpreted.

I understand what you're suggesting, and I appreciate your testimony. Professor Bender.

Mr. BENDER. Thank you, Mr. Chairman, Senator Levin.

I am made a little uneasy by your mention of the policy of nonacquiescence as it relates to your committees' rules since I have violated your rules by not having a written statement in advance. I am really sorry. I was engaged last week in emergency litigation and was unable to compose a written statement before coming here. So I will be very brief, and I would be glad to respond to questions. The committee has asked me to testify with regard to section 9 of S. 476, and has asked me, essentially, two questions.

One, is the policy of departmental nonacquiescence constitutional?

Second, for my comments on the manner is which section 9 is presently drafted.

I am here representing no one but myself. The background that may qualify me to do so is that I am a professor of constitutional law, and that I worked for some years in the Solicitor General's

Office of the Department of Justice, where I came into contact, with some frequency, with governmental policies—or threatened governmental policies—of nonacquiescence in Federal court decisions.

I think it is probably a mistake to make your consideration of section 9 turn on whether you think the policy of nonacquiescence is constitutional or not. In my view, there are some very interesting arguments about why it may be unconstitutional, but I think they're basically irrelevant to the questions before you now. The important thing to me is that it seems to me that Congress clearly has the constitutional authority to require the Secretary to acquiesce if, in your view, it would aid the proper administration of the statute. And in my view, for the reasons you have heard today, it clearly would aid the proper administration of the statute to have a policy requiring acquiescence in some circumstances.

Senator COHEN. Do you mean having a policy of appeal or nonacquiescence?

Mr. BENDER. Let me get to that in a moment. What I mean to say is that your power to tell the agency whether to acquiesce does not turn on whether their conduct is unconstitutional. It turns on what is the proper way for them to behave in the administration of the statute. You—Congress—have the right to set the rules of decision for the agency. You can set—and have set—the substantive rules. You also clearly have the right to say that one of those rules of decision is that they should follow binding precedent in a Federal circuit. That doesn't turn on their conduct being unconstitutional. It turns on it being a good idea in Congress' view, for them to follow binding precedent.

Senator COHEN. Would it be a fair compromise to suggest that perhaps rather than mandating an either/or choice, you either appeal it to the Supreme Court or you acquiesce, to require a public statement as to the reason for nonappeal?

Mr. BENDER. I don't think that such a public statement would solve the problem. I think it is a much better way of solving the problem to say that, if they do not appeal to the Supreme Court, then they should acquiesce at the circuit level. No one has suggested doing it at the district court level, nor do I suggest that.

Senator COHEN. Only in that circuit?

Mr. BENDER. Yes. And I think that's one technical defect I find in the present draft. As the present draft is written, it would require nationwide nonacquiesence. I think that's unfair to the administration. The first circuit decision is not always correct. They should have the freedom to seek another circuit's disagreement with that first decision. If they get that disagreement, then they have a conflict in the circuits, which would probably motiviate the Supreme Court to grant review. I don't see any enormous danger in that policy, as long as they must acquiesce within the circuit involved.

A second problem with the way the statute is presently drafted is, it says "must either acquiesce in such decision with respect to all beneficiaries"—as I have just said I would add the language "within the circuit" or "must request review of such decision in the Supreme Court of the United States." But then it doesn't say what happens if they request review in th Supreme Court of the United

States, and then review is denied. It makes it sound as though they don't have to acquiesce if a petition for *certiorari* is denied, which is likely to happen if there is no conflict.

It seems to me that that is wrong. If the department petitions for *certiorari*, and it's denied, then they should acquiesce.

There is another interesting problem as to what they should do between petitioning for certiorari and the Supreme Court's decision about whether or not to take certiorari. I am sure you know a lot more than I do about the hardships that can occur to beneficiaries in that period of time. It would seem to be perfectly possible to say that the department should acquiesce, unless the court grants *certiorari*, which would mean they would have to acquiesce up until the time of grant. Once the Supreme Court has granted *certiorari*, I think perhaps they should not have to acquiesce, pending the Court's decision on the merits, although probably they would just put those cases on hold for a while.

Another possibility would be to say the department should acquiesce unless they petition, and then when the court denies *certiorari*, they should acquiesce hereafter.

A third drafting problem I find here has to do with the title of the section. You say, "Mandatory appeal by Secretary of certain court decisions." I think that is an indelicate way of putting it. If there is a serious constitutional problem with what you are doing, it is that someone might argue that this section is an impermissible legislative intrusion into executive prerogatives. The executive should be able to decide what cases to appeal and when not to, and you should be able to tell them that they must appeal.

I have some sympathy with that position. It sounds like something the executive should, in fact, decide. So I think I would change the title of the section and not say "mandatory appeal" but "acquiescence by the Secretary in certain court decisions." And even in the body of the section, instead of saying "must either acquiesce or appeal," why not just say "must acquiesce unless they appeal"? Don't seem to be telling them, that is, what they have to do with regard to appeals. That is their business. Instead, tell them what they have to do if they do not appeal, or if their petition for *certiorari* is denied.

Finally, I am very troubled by the retroactivity provision in subsection (b). It seems to me that if this statute were enacted as it is written, or even as I have just discussed changing it, that retroactivity provision, would be cutting the heart out of the statute.

The problem is that under this retroactivity provision, the requirement of acquiescence would not apply to any court of appeals decision that has already been rendered. It would only apply to court of appeals decisions rendered after the date of enactment. The *Patti* decision—for example, or the *Finnegan* decision—these very important cases, which are causing tremendous problems now, have already been rendered.

If you want the Department—and you should want them—to acquiesce in those decisions, I do not think the retroactivity provision should be drafted to say that it shall apply with respect to any decision of a court of appeals rendered on or after the date of enactment. That would exclude *Patti* and *Finnegan*.

I am not sure why a retroactivity provision is in here anyway. I do not think it is constitutionally necessary. If it is in here so the Department does not have to reopen cases that they have already decided, then I would put it that way and say this policy does not require then to reopen any particular individual decision that has already been made—"them" being the agency.

But the acquiescence policy should clearly apply to court of appeals decisions that were rendered 10 years ago. In fact, it seems to me that the older the court of appeals decision is, the stronger the case for acquiescence. If the decision has been around for 10 years and has not been disagreed with by the Supreme Court or by another court of appeals, that is the model of the kind of case in which the Department ought to acquiesce.

I would make those drafting changes, and with those changes I am very much in agreement with the tenor of this section. It seems to me that, regardless of what happens with the IRS, this is a different situation. Here, as has been said many times, if people lose benefits because of an administrative decision, and the administration does not acquiesce, those needy individuals are going to be without those benefits for a substantial period of time until they bring their own lawsuit, and perhaps even until they have to go up to the circuit court level. That is a tremendous potential hardship on people.

Taxpayers are ordinarily not in that situation. Taxpayers can almost always orchestrate the litigation so they do not have to pay until after they litigate. You can ordinarily go into the tax court and delay that obligation, I believe. Where people are in a situation of being forced to wait through 2 years of litigation, and lose these vital benefits in the interim, it seems to me that is an especially strong situation in which to require an acquiescence policy.

Senator COHEN. Professor Bender, thank you very much. Ms. Ackel. I have no questions. We may have questions we will ask you for the record.

You are excused from the 48-hour requirement, in light of your circumstances. It says in our rules that the chairman has the power to waive the 48 hours requirement under mitigating circumstances, and we think that is mitigation enough for your past weekend's activities.

Senator LEVIN. May I just add my thanks to both of you. You have been very helpful in submitting documents to the subcommittee and helpful with your testimony today. I may have some additional questions to submit for the record, in light of the time problem here, including the question of whether Congress has ever exercised that right to tell agencies how or whether to acquiesce if they do not appeal. Perhaps both of you will have some comments on that. And again, your testimony has been extremely helpful. And thank you for helping us to clean up our bill.

Mr. BENDER. Would it help you if I put my drafting suggestions on paper?

Senator COHEN. Yes. And your documents will become part of the record, Ms. Ackel.

[The prepared statement of Ms. Ackel (with attachment) and a letter to Senator Cohen from Mr. Bender follow:]

STATEMENT OF

ELENA H. ACKEL

SENIOR ATTORNEY

LEGAL AID FOUNDATION OF LOS ANGELES
AND ONE OF COUNSEL FOR PLAINTIFFS
IN LOPEZ V. HECKLER

Role of Administrative Law Judge in the Title II Social Security Disability Program

Before the Subcommittee
on Oversight of Government Management
Committee on Governmental Affairs
United States Senate

June 8, 1983

My name is Elene H. Ackel. I am senior attorney in the Watts Office of the Legal Aid Foundation of Los Angeles and am one of the attorney's representing the plaintiffs in the case of Lopez v. Heckler, Civil No. 83-0697-WPG, which challenges the Social Security Administration's (hereafter SSA) policy of nonacquiescence. The lawsuit has two parts. First, we are challenging SSA failure to follow two Ninth Circuit decisions requiring that medical improvement must be shown before a recipient's disability benefits can be terminated. Finnegan v. Mathews, 641 F.2d 1340 (9th Cir. 1981); Patti v. Schewiker, 669 F.2d 582 (9th Cir. 1982. Second, on a national basis, we are challenging SSA's policy of regularly nonacquiescing to circuit court decisions with which it disagrees. Our attention thus far has been focused on an effort to require SSA to apply the medical improvement standard in all disability termination cases in the states comprising the Ninth Circuit. (California, Washington, 1/ Oregon, Alaska, 2/ Hawaii, Idaho, Nevada, Arizona and Montana). Social Security's refusal to follow Finnegan and Patti, are but two examples of SSA's nonacquiescence policy.

Two Forms of Nonacquiescence Applied By Social Security Administration

The Social Security Administration's "nonacquiescence"

1/ Our class if certified would exclude the State of Washington because of two cases which were brought because of Social Security's refusal to follow Finnegan and Patti for which classes have been certified:

(1) Siedlecki v. Schweiker, Case No. C82-61R (W.D. Washington) which, by a judgment dated January 28, 1983, reversed all administrative decisions terminating the benefits of grandfathered SSI

Footnote continued:

recipients residing in the State of Washington because of the cessation of disability unless the decision expressly adopted the Finnegan standards. The class was defined as any grandfatheree who received an adverse termination decision because of cessation of disability within the 60 days prior to April 16, 1981, or subsequently, or who had an administrative appeal pending with respect to such a termination on that date.

(2) Morrison v. Heckler, Case No. C 82-888-V, as discussed below, challenged the Secretary's policy of formal nonacquiescence with respect to Patti and Secretary's policy of informal nonacquiescence to Griffis v. Weinberger, 509 F.2d 837 (9th Cir. 1975), Day v. Weinberger, 522 F.2d 1154 (9th Cir. 1975) and Rhodes v. Schweiker, 660 F.2d 722 (9th Cir. 1981). Preliminary relief for the Washington State class was ordered May 27, 1983.

2/ Almdale v. Heckler, filed May 6, 1983, in the district of Alaska, challenged, on behalf of Alaska State residents, the Secretary's formal policy of nonacquiescence in Patti and Finnegan and the Secretary's informal policy of nonacquiescing in other Ninth Circuit precedential decisions. Temporary relief for Mr. Almdale was ordered May 19, 1983.

policy is manifested in two forms. The first is the publication of formal nonacquiescence rulings.[3] The second is less overt, but just as unlawful. After a circuit court has ruled contrary to the Secretary's position, the circuit court precedent is not incorporated, or even mentioned, in the Program Operation Manual System (hereafter POMS). SSA employees therefore do not adopt the judicial precedent in handling claims at the initial determination and reconsideration level of administrative review. Further, Section 1.161 of the Office of Hearing and Appeals Handbook instructs the Administrative Law Judges (hereinafter ALJ's)not to follow federal court decisions which are inconsistent with SSA's previous interpretation of the law, regulations or rulings unless SSA instructs them in writing to the contrary.

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[3] In addition to Patti v. Schweiker, supra, and Finnegan v. Mathews, supra (establishing a medical improvement standard in termination cases), other cases for which the Social Security Administration has issued formal nonacquiescence rulings are: Rasmussen v. Gardner, 374 F.2d 589 (10th Cir. 1967) in Social Security Ruling 68-48c (existence of partnership is not necessary condition for dividing self-employment income between husband and wife who operated a family enterprise together and crediting income to their respective accounts for Social Security purposes); Pleasantview Convalescent and Nursing Center, Inc. v. Weinberger, 565 F.2d 99 (7th Cir. 1976) in SSR 77-35c (prior to amendment of Medicare statute, court had jurisdiction to review adverse determinations under Administrative Procedure Act's provisions for nonstatutory review and under general federal question jurisdiction); Johnson v. Califano. 607 F.2d 1178 (6th Cir. 1979) in SSR 80-10c (SSA has burden of proof to overcome presumption of death when wage earner has been absent and unheard of for seven years); Levings v. Calfino, 604 F.2d 591 (8th Cir. 1979) in SSR 80-11c (person who resided voluntarily and pays for services in a publicly run nursing home is not an "inmate" of a public institution and is eligible for SSI); Hutcheson v. Califano, 638 F.2d 96 (9th Cir. 1981) in SSR 81-28c (child born to mother during temporary separation from husband is "stepchild" of husband and entitled to child's insurance benefits); Boyland v. Califano, 633 F.2d 430 (6th Cir. 1981) in SSR 81-28c (minor illegitimate children are entitled to survivor's benefits although contributions made by their father for their support were neither regular nor substantial, when the contributions were important to the children, considering their needs and the father's economic condition); Campbell v. Secretary of the Department of Health and Human Services, 665 F.2d 48 (2d Cir. 1981), cert. granted sub nom. Schweiker v. Campbell, ____ U.S. ____ 73 L.Ed.2d 1348, 102 S.Ct.

Our lawsuit, Lopez v. Heckler, seeks to enjoin both types of nonacquiescence, formal and informal, on the part of SSA at all levels of the administrative review process. The lawsuit entitled Morrison v. Heckler, C 82-888-V, also challenged both types of nonacquiescence. On May 27, 1983, the United States District Court for the Western District of Washington issued a class preliminary injunction in that case providing that the Secretary and the Social Security Administration, including the Disability Determination for the State of Washington,be enjoined from:

> A. Making and issuing determinations on continuing disability investigations which do not apply the standard enunciated in Patti v. Schweiker, 669 F.3d 582 (9th Cir 1982. 4/
>
> B. Making and issuing determinations not in accord with the standard enunciated in Griffis v. Weinberger, 509 F.2d 837 (9th Cir. 1975) relative to the evaluation of disability from alcoholism or drug addition. 5/

Footnote Continued:

2956 (June 21, 1982) in SSR 83-33c (finding that claimant was not disabled was not supported by substantial evidence where jobs available to claimant, who was found capable of performing light work, were not specified). Circuit Court decision was reversed by a decision of Supreme Court issued on May 13, 1983, ___U.S. ___ (1983).

4/ SSA previously issued a written determination not to acquiesce in this decision (formal nonacquiescence).

5/ SSA issued no formal nonacquiescence determination with respect to this court decision (informal nonacquiescence). The decision provided that severe chronic alcoholism and related drug abuse, standing alone, could, if severe enough, amount to disability.

C. Failure to apply the standards enunciated in Day v. Weinberger, 522 F.2d 1154 (9th Cir. 1975) and Rhodes v. Schweiker, 660 F.2d 722 (9th Cir. 1981) in the evaluation of class members. 6/

Thus, as a result of SSA nonacquiescence policy, both formal and informal, the Disability Determinations Sections of the states (hereafter DDS's), the Administrative Law Judges, and the Appeal Council do not evaluate disability claims according to the precedent established by their respective circuit courts of appeal interpreting the Social Security Act and regulations. Instead, the SSA evaluates claims pursuant to guideline which are both inconsistent with and more stringent than those established by federal case law.

Nonacquiescence In Medical Improvement Standard In Disability Termination Cases

SSA's policy of nonacquiescence has a particularly devastating impact when it is applied to the continuing disability investigation (hereafter CDI) in those states situated in circuit court districts which have issued decisions establishing a medical improvement standard in

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6/ SSA issued no formal nonacquiescence determination with respect to these court decisions (informal nonacquiescence). These decisions provide that in those cases where SSA rejects the examining physician's uncontroverted conclusion that a claimant/recipient is disabled, SSA's decision must be accompained by clear and convincing reasons for the rejection.

disability termination cases.[7] The policy is all the more pernicious when combined with SSA's usual tactic of not appealing circuit court decisions,[8] which it has lost and with which it disagrees. In this manner, SSA policy of not following the medical improvement standard in the appropriate circuits is rendered immune from effective judicial review.

Background Regarding Use Of Medical Improvement Standard In Ninth Circuit

Between 1954 and 1976 the standard used by the Social Security Administration in CDIs was a "medical improvement" standard. Under that standard, benefits would not be terminated without a showing that the recipient's medical condition had improved.

This standard was changed administratively in 1976 to the "current disability standard" without any change in the Social Security Act itself and without any change in federal regulations. The Act requires at 42 U.S.C. § 416, § 423, inter alia, a finding that a recipient's disability "ceases" prior to termination of benefits. In August 1980, a standard was published in the Federal Register which would allow the Secretary to terminate disability benefits "if the medical or other evidence shows that [the claimant is] not disabled, or if there is not enough evidence to support a finding that disability continues." 45 Fed. Reg. 55566 [Aug. 20, 1980], 20 C.F.R. § 404.1590. See also 20 C.F.R. §§ 404 1591-1595. The Secretary has interpreted and implemented this regulation to mean that an improvement standard is no longer necessary in her Program Operation Manual System (POMS) at POMS § 2864 and in Social Security Ruling No. SSR-81-6 (January, 1981).[9]

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[7] See current court cases in addition to Patti v. Schweiker and Finnegan v. Mathews requiring a showing of medical improvement in disability termination cases: Miranda v. Secretary of HEW, 514 F.2d 996 (1st Cir. 1975); Cassiday v. Schweiker, 663 F.2d 745, 749 (7th Cir. 1981); Weber v. Harris, 640 F.2d 176 (8th Cir. 1981); Simpson v. Schweiker, 691 F.2d 966, 969 (11th Cir. 1982). Cf. Hall v. Celebrezze, 314 F.2d 686 (6th Cir. 1963); Rivas v. Weinberger, 475 F.2d 255, 258 (5th Cir. 1973).

[8] SSA only appealed one of the Circuit Court decisions where it issued a formal nonacquiescence determination (see footnote 3 supra). Further, the Finnegan and Patti cases were not appealed nor, to my knowledge, have any of the other circuit court medical improvement cases been appealed.

In ruling on a challenge to SSA's policy, the Ninth Circuit held that once a claimant has been found disabled, a presumption of continuing disability is created and benefits can be terminated only where there is substantial evidence of medical improvement. Patti v. Schweiker, 669 F.2d at 587 (9th Cir. 1982).[10] In accord, Iida v. Heckler, ___ F.2d ___, 83 D.A.R. 1316 (9th Cir. 1983). SSA has issued a written determination not to acquiesce in the Patti decision. Social

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[9] The POMS § 2964 instructs the state DDS not to apply a medical improvement standard and Social Security Ruling No. 81-6 sends the same instruction to the Administrative Law Judges and the Appeals Council. Consequently, at all stages of review, Social Security personnel are forbidden from applying a medical improvement standard in cessation of disability cases.

[10] Although Patti has to do with termination of Supplemental Security Income benefits, its rationale is equally applicable to the termination of Title II Social Security benefits because, under the Social Security Act and implementing regulations, the disability test and the procedure for determining disability are the same. 42 U.S.C. § 423(d); 42 U.S.C. § 1382(c)(3)(A).

Security Ruling 82-49(c) (October 1982).

Similarly, defendants have specifically refused to follow the Ninth Circuit ruling in Finnegan v. Mathews, 641 F.2d 1340, 1347 (9th Cir. 1981). The court provided that SSI disability benefits of a person "grandfathered" in from state disability programs, when the SSI program began in 1974, could not be terminated absent proof of a "material improvement of his medical condition or of the commission of a clear and specific error during the prior state [disability] determination." SSA refused to follow this decision and has issued a ruling so stating, see Social Security Ruling 82-10(c) (January 1982). It is of particular significance that in Finnegan the Social Security Administration decided against seeking review in the Supreme Court because of "significant weaknesses" in its position. In a memorandum to SSA's Assistant General Counsel, staff conceded that there had been no improvement of Finnegan's medical condition and that it was "questionable whether Finnegan is in fact not disabled at this time." See Memo of Sandy Crank, Associate Commissioner for Operational Policy and Procedures, September 4, 1981. Fearing a loss in the Supreme Court, SSA instead issued its ruling of nonacquiescence "in order to limit the holding of the Ninth Circuit." Id., at 3.

Legality of SSA's Policy of Nonacquiescence

Pursuant to the concept of the separation of powers, the Social Security Administration, as an agency of the Executive Branch, must follow the law as interpreted by the federal courts. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803); U.S. v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed. 1039 (1974). See plaintiffs' brief in Lopez v. Heckler at pp. 21-25 for a complete discussion, a portion of which is attached as Exhibit "B".

In addition, administrative agencies are bound by the law of the circuit.[11/] Ithaca College v. N.L.R.B., 623 F.2d 224 (2d Cir. 1980); Allegheny General Hospital v. N.L.R.B., 608 F.2d 965 (3d Cir. 1979). See plaintiffs' brief in Lopez v. Heckler at pp. 26-28 for a complete discussion. A portion of the brief is attached as Exhibit "B".) Further, courts have consistently rejected SSA's policy of nonacquiescence when the issues has been raised. Hillhouse v. Harris, 547 F.Supp. 88 (W.D. Ark. 1982); Hollingsworth v. Schweiker, No. N81-0035C (E.D. Mo. 1983); Chee v. Schweiker, No. Civ. 82-693-PCT-VAC (D.C. Ariz. 1982); Siedlecki v. Schweiker, No. C 82-61R (W.D. Wash. 1983); Flores v. Secretary of HEW, 228 F.Supp. 877 (D.P.R. 1964). See plaintiffs' brief in Lopez v. Heckler at pp. 28-31 for a more complete discussion of these cases. A portion of said brief,including the referenced discussion,is submitted as Exhibit "B". Also see discussion of Morrison v. Heckler, supra.

11/ Social Security's argument that it is entitled to nonacquiesce in circuit court decisions because the Internal Revenue Service nonacquiesces bespeaks a failure to understand the IRS system and a failure to understand the differences between the two agencies:

1. The IRS does in fact follow Federal circuit court decisions within the jurisdiction of the circuit deciding the case. (Source conversation with Joe Gerber, Deputy Chief Counsel for Internal Revenue Service on June 6, 1983).

   a. When the IRS issues a nonacquiescense ruling, with respect to a circuit court decision, it is announcing that it will not follow the precedent of one circuit court in other circuits.

   b. When the IRS issues an acquiescence ruling, it is announcing that it will follow the precedent of one circuit court decision in other circuits.

2. The IRS policy of nonacquiescence applies primarily to Tax Court decisions. The Tax Court is an Article I decision-making body and thus is an agency within the Executive Branch. It is not an Article III body. The announcements of acquiescence or nonacquiescence have been an attempt to let the public know what the IRS policy is concerning a Tax Court ruling.

3. Where the IRS disagrees with a circuit court's ruling on an issue, the IRS follows a policy of litigating the issue in other circuits in order to create a split among the circuits so as to create a ground for Supreme Court review. Unlike Social Security, the IRS does not ignore the precedent with which it may disagree.

4. There are multiple fora in which a tax litigant may pursue a claim. A claimant may take a dispute over taxes to Tax Court before paying. The Tax Court is a court of National jurisdiction which sits in various cities aroung the country. A claimant may also pay the amount owed and then sue for a refund in the Court of Claims in Washington, D.C. or in the district court where the claimant resides. Even if the IRS were not to follow the decisions of a

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Footnote Contunued:

court of appeals within a particular circuit (which in fact is not the case), a tax litigant is in a far stronger position than a Social Security claimant who cannot forum shop as can the tax litigant.

5. Even the Tax Court, which is an agency within the Executive Branch, must follow the law of the circuit court in the jurisdiction of that court. Golsen v. Commissioner, 54 Tax Reporter 742 (1970).

In summary, an examination of IRS practice leads to a rejection of Social Security's practice of nonacquiescing in circuit court decisions with which it disagrees.

Social Security's policy of nonacquiescing in federal circuit court decisions violates the Due Process Clause of the Fifth Amendment. The nature of the Due Process violation resulting from Social Security's policy of nonacquiescence is illustrated by reference to Patti v. Schweiker, supra, one of the medical improvement cases to which SSA has formally nonacquiesced. In Patti, the Ninth Circuit held that once a claimant has been found disabled, a presumption of continuing disability is created. Benefits may be terminated because of cessation of disability only where there is evidence of medical improvement. Thus Patti establishes "medical improvement" as an essential element in determining a recipient's continued eligibility for disability. Social Security's policy of nonacquiescence, however, prohibits consideration of any evidence of this issue at the initial review and at the reconsideration before the state DDS, at the administrative hearing, and at the Appeals Council level. Patently, the exclusion of such an important element from the review process denies the recipient a meaningful hearing and thus denies the recipient his right to Due Process. See plaintiffs' brief in Lopez v. Heckler at pages 31 to 41 for a complete discussion of the violation of Due Process resulting from SSA's policy of nonacquiescence. A portion of said brief including the Due Process discussion is submitted as Exhibit B.

Response to Social Security's Arguments Regarding Nonacquiescence

The Secretary of Health and Human Services has argued that her policy of nonacquiescence does not trench on the Constititional policy of separation of powers. The Secretary argues that her "policy of non-acquiescence - which after all, is only a policy of being able to ask rather than compel courts to overrule their precedents - does not threaten the judiciary's authority....".[12] However, as discussed above, the Secretary follows a policy of not seeking to have circuit court decisions with which she disagrees overruled. She does this by refusing to petition the Supreme Court to hear the case.

The Secretary fails to see that it is nonacquiescence which obstructs further judicial examination when she both fails to appeal, and refuses to follow, the cases she loses. Moreover, it is disingenuous, at least, for the Secretary to propose that nonacquiescence is nothing more than being able to ask courts to overrule their decisions. Nonacquiescence is a limitless license to refuse to follow the judiciary, while imposing upon indigent, disabled citizens the burden of mounting lengthy administrative and judicial appeals before a lawful standard is applied.

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[12] Page 19, lines 15-18, of the Defendants' Memorandum in opposition to Plaintiffs' Motion for Preliminary Injunction in Lopez v. Heckler, filed May 16, 1983.

The Secretary has various options open to her in addition to the option of asking the Supreme Court to reverse a case with which she disagrees:

1. The Secretary may litigate the issue in other circuits in order:
    a. to develop a split among the circuits and thereby create a ground for Supreme Court review (Rule 1711(a)(c), Supreme Ct. Rules): or
    b. to foster contrary judicial analysis of the issue to develop a basis for reversal in the circuits taking positions with which the Secretary disagrees.

2. In subsequent cases the Secretary could argue, upon a claimant's appeal of an administrative decision denying benefits that (a) the decision below was correct, (b) even if incorrect, the precedential case was wrongly decided and should be overturned. Given the number of appeals

that take place every year within a circuit, the Secretary would be provided ample opportunity to relitigate the issue.

3. Since many, if not most, of the circuit court cases with which the Secretary disagrees involve statutory interpretation, an option always open to the Secretary is going to Congress and seeking clarifying legislation.

The Human Consequences of Social Security's Policy of Nonacquiescence and Social Security's Refusal to Follow a Medical Improvement Standard

Countless Americans have suffered because of Social Security's policy of nonacquiescence and Social Security's refusal to apply a medical improvement standard in disability termination cases. The medical improvement standard's presumption of continued disability absent substantial evidence of improvement is an important protection against erroneous termination of benefits. See Plaintiffs' brief in Lopez v. Heckler at pages 54-62 for numerous examples of harm that have befallen erroneously terminated recipients because of Social Security's policy of nonacquiescence. A portion of said brief including the referenced discussion is submitted as Exhibit B.

Submitted as Exhibit A are summaries of the supplemental declarations filed by plaintiffs in Lopez v. Heckler. The declarations of Raymond Barnett, David Briggs, Evelyn Crook, Freddie Howell, Jimmie Littles and Amos H. Marker clearly show the desperate circumstances faced by disability recipients who receive an adverse disability determination at the ALJ level of review, because the correct standard of review (medical improvement) was not applied. Such persons are left without benefits or any medical coverage such as Medicare or MediCal.

An example in point is set forth in the summary of the declaration submitted by the wife of Faustino Trejo. Faustino Trejo is a 40-year-old resident of California who initally was awarded Social Security disability benefits because of progressively worsening conditions of chronic renal failure, congestive heart failure, poorly controlled hypertension and insulin dependent diabetes. He had to go on kidney dialysis and then have a kidney transplant. He has had additional problems with kidney rejection and bad reactions to chemotherapy for the kidney rejection. He received $263 monthly SSDI, $208 monthly SSI, Medicare and Medi-Cal since 1980. Social Security determined he was no longer disabled as of August 1982.

Mr. Trejo received a unfavorable hearing decision from an administrative law judge on December 30, 1982. He filed a timely request for review of hearing decision with the Appeals Council, and on May 11, 1983, the Appeals Council issued a decision upholding termination of Mr. Trejo's benefits. When the Social Security Administration decided to terminate Mr. Trejo's benefits, he had had 12 hospitalizations for poor control of his conditions including uncontrolled diabetes mellitus, recurrent paroxysmal arterial fibrillations, stroke syndrome secondary to thrombus versus thrombo-embolic event from left ventricle, diffuse atherosclerotic vascular disease, coronary artery disease, poorly controlled hypertension and enlarged heart, excess urea in the blood and cryptococcal meningitis.

After filing his request for review by the Appeals Council, Mr. Trejo suffered a massive stroke/left cerebrovascular accident in March 1983. He needs to be a full-time patient in a nursing home or hospital. He cannot control his bodily functions or take care of his personal needs. He is also violent and has harmed his wife without understanding what he is doing. His wife now puts him in a straightjacket to keep him under control. He can only say a few words. His wife cannot take care of him on her own. None of the hospitals or nursing homes will allow him to stay because his Medi-Cal was terminated with his SSI. He has found an attorney to help him file an appeal in federal district court, but Mr. Trejo, his wife and small granddaughter do not know how they will survive during the two years it usually takes to resolve an appeal in federal district court. His wife has previously worked as a waitress, but she has been prevented from working for there is no one else to take care of her husband.

An additional set of declarations detail the increased stress, aggravation and financial worry faced by nine cardiac patients and two other terminally ill disability recipients who died of their disabilities after having their disability benefits terminated. See the summaries of the declarations of surviving spouses at pages 2-9 of Exhibit A.

The declaration of J. Michael Criley, M.D. indicates how increased stress, emotion or exertion caused by a termination, or threatened termination of disability benefits can cause a cardiac patient to have an acute coronary attack which can be fatal. See the summary of the declaration of J. Michael Criley, M.D., Chief of the Department of Cardialogy at Harbor UCLA Medical Center at page 1 of Exhibit A.

Further, Senator Metzenbaum's letters of December 8, 1982, and January 5, 1983, to the General Accounting Office documenting 43 deaths of disability recipients who died of their disabilities after being terminated indicate that many persons have had to spend their last days and weeks worrying about how they are going to support themselves and their families. Also see Deputy Commission of Social Security Simmons' April 7, 1983, response to Senator Heinz' inquiry of October 5, 1982, regarding the 11 deaths reported in the L.A. Times of those who had their disability benefits either discontinued or denied. Two of the eleven cases concern cardiac patients, Russell L. Beard and Victor Graf for which plaintiffs have submitted declarations from the surviving spouse. See summaries at pages 2-3, 4-5 of Exhibit A. The Deputy Commissioner of Social Security, Paul Simmons, had the files in these two cases reviewed in response to Senator Heinz' request and in both cases the conclusion of the review was that the decision to terminate disability "was not correct when made". Obviously this additional review does Mr. Graf and Mr. Beard no good as they both died of a heart attack after they were terminated from disability. Mr. Graf had a heart attack shortly after he left his doctor's office where he went to obtain additional evidence to prevent his termination.

Had the Secretary followed the Ninth Circuit rulings requiring medical improvement rather than her cruel policy of "nonacquiescence," many of the people discussed above may not have suffered as they did.

CONCLUSION

SSA's policy of nonacquiescence is government wrongdoing which results in two kinds of harm. First the Social Security Administration had arrogated to itself the authority to choose which decisions of the Courts of Appeals it shall follow and which it shall ignore. It issues "rulings of nonacquiescence" to those opinions with which it disagrees. In most instances these "rulings" are issued as an alternative to pursuing further appeal because the Social Security Administration fears that the Supreme Court will rule against it.

Second, over the past two years, the disabled have been subjected to what one Congressional report termed a "wholesale purge" of the Social Security disability rolls. Hundreds of thousands of individuals victimized by severe arthritis, heart disease, mental impairments, neurological disabilities, and other conditions, have had their Social Security disability checks cut off. The consequences in human terms have been staggering. (See exhibit "A")

The nonacquiescence policy and the disability terminations are related. Several Court of Appeals -- including the Ninth Circuit -- have ruled that disability recipients cannot lose their benefits without the government presenting evidence that such persons have medically improved. Defendants refuse to follow those decisions. Thus, the dual harm from the nonacquiescence policy: defendants flout the bedrock

Constitutional principle that it is the province of the courts to say what the law is, and by doing so have caused thousands of disabled Americans to lose their last tether to dignity and survival.

Respectfully Submitted,

Elena H. Ackel
ELENA H. ACKEL

EXHIBITS TO
STATEMENT OF
ELENA H. ACKEL
SENIOR ATTORNEY
LEGAL AID FOUNDATION OF LOS ANGELES
AND ONE OF COUNSEL FOR PLAINTIFFS
IN LOPEZ V. HECKLER

Role of Administrative Law Judge in the Title II Social Security Disability Program

Before the Subcommittee
On Oversight of Government Management,
Committee on Governmental Affairs

June 8, 1983

Digest of Supplemental Declaration in Support of Plaintiffs' Motion for Preliminary Injunction in Lopez v. Heckler showing harm caused by SSA's failure to follow medical improvement standard............Exhibit A

Portion of Plaintiffs' brief in Support of Plaintiffs' Motion for Preliminary Injunction in Lopez v. Heckler regarding legality of SSA's policy of nonacquiescence................................Exhibit B

DIGESTS OF SUPPLEMENTAL DECLARATIONS
IN LOPEZ V. HECKLER
SHOWING HARM CAUSED BY SSA'S FAILURE
TO FOLLOW MEDICAL IMPROVEMENT STANDARD

EXHIBIT A

FILED

JUN 1 1983

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARIO LOPEZ, et al.,
Plaintiffs,
v.
MARGARET M. HECKLER, et al.,
Defendants.

CIV. NO. 83-0697-WPG

DIGESTS OF SUPPLEMENTAL DECLARATIONS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

HEARING DATE: June 6, 1983
HEARING TIME: 10:00 A.M.
COURTROOM: J-1001

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DECLARATIONS REGARDING CARDIO-VASCULAR DEATHS

1. J. MICHAEL CRILEY, M.D.
2. RUSSELL BEARD
3. HOWARD BOWERS
4. WILLIAM DENNY
5. VICTOR GRAF
6. EDDIE HARRIS
7. MARTIN LEE MAULDWIN
8. JOHN RANKIN
9. FORREST SISK
10. DEANE WITT

OTHER DEATHS

11. LYLE ELY
12. RONALD GRAY

SUICIDES

13. LARRY HOOKER
14. KATHERINE MC KINSTRY

UPDATE OF PRIOR DECLARATIONS*

15. WALLACE DORSEY

ADDITIONAL EXAMPLES OF IRREPARABLE HARM SUFFERED BY CLASS MEMBERS WHO ARE WITHOUT ANY BENEFITS

17. DAVID BRIGGS
18. EVELYN CROOK
19. FREDDIE HOWELL
20. JIMMIE LITTLES
21. AMOS H. MARKER
22. FAUSTINO TREJO

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* See also digest paragraph 12 regarding Ronald Gray

DECLARATIONS REGARDING CARDIO-VASCULAR DEATHS

1. J. MICHAEL CRILEY, M.D., is the Chief of the Cardiology Department of Harbor UCLA Medical Center (hereafter "Harbor") and Professor of Medicine and Radiological Sciences at UCLA Medical Center. He has worked at Harbor for 15 years. In heart patients, stress, exertion, emotion or lack of medication can precipitate or be a contributing factor in causing an acute coronary attack which can often be fatal. Threat of termination or termination of benefits, and the consequent loss or eventual loss of a significant portion of a family's income, is likely to cause stress and an emotional reaction in the cardiac patient which in turn could precipitate an acute coronary attack. The declarations of the surviving spouses of the cardiac patients who died detail the increased stress visited upon their deceased spouses when each was threatened with loss of benefits or actually lost disability benefits that the family was depending upon. Further, the loss of income, due to the termination of disability benefits, may leave the family without sufficient income to pay for the combination of cardiac drugs needed by the patient. Lastly, if a terminated disability recipient were required to return to work, as happened in the cases of Eddie Harris and William Denny, the cardiac patient's level of exertion would be increased, and such increased exertion could precipitate an acute coronary attack.

2. RUSSELL BEARD was a resident of Ohio who suffered from residuals of a severe heart attack which occurred in February 1974. He and his two dependent sons had been receiving SSDI

since 1975. Their SSDI benefits were terminated in November 1981. At the time of termination of his benefits MR. BEARD's condition had deteriorated to the point that his doctor warned him that he was on the verge of a stroke. He was hospitalized from October 25-31, 1981, from December 10-20, 1981, and from January 7-18, 1982. The Social Security Administration, upon reconsideration, upheld the termination of MR. BEARD's benefits of $593 per month and held that he must repay an overpayment received by him and his two dependent sons. MR. BEARD was hospitalized at the time of said denial on appeal, and, because of his weakened condition, his doctor advised that he not be informed. On January 18, 1982, 4 days after the Social Security Administration upheld its termination of his benefits, RUSSELL BEARD died of a heart attack. His wife appealed the termination, and in April of 1982 an administrative law judge for the Social Security Administration found that Mr. BEARD's disability continued through the date of his death.

3. HOWARD BOWERS was a resident of Arizona. He worked for 32 years as a bus driver. He and then began receiving SSDI benefits in 1978 because of severe heart disease. MR. BOWERS received $1,240 monthly SSDI for himself and his wife and minor daughter. He also received Medicare. The Social Security Administration terminated MR. BOWERS' disability benefits in November 1982. When the Administration terminated his benefits, MR. BOWERS was very weak and ill, and he was in need of triple by-pass open heart surgery. When he received his termination notice, MR. BOWERS became very depressed, worried and

frightened that he would not be able to pay for the open heart surgery he needed. He filed a request for Reconsideration. In February 1983, MR. BOWERS' condition had deteriorated so that he had to enter the hospital for his heart surgery. He died February 22, 1983, prior to receiving any decision on Reconsideration from the Social Security Administration.

4. WILLIAM DENNY was a resident of Illinois who suffered from residuals of a severe heart attack which occurred in 1978, after which he was restricted by his doctors from all activities and kept alive with extensive costly medication. He had been receiving SSDI since 1979. His SSDI benefits of $591 per month were terminated in June 1982. At the time of termination of his benefits his condition had deteriorated. After his benefits were terminated, due to the cost of his and his family's necessities of life, WILLIAM DENNY attempted to return to work. After two days on the job he was hospitalized for three days. He again attempted to work and took an eight day truck driving job, after which he was so weak he could not even speak. On July 31, 1982, nine days after his last work attempt WILLIAM DENNY died of a heart attack.

5. VICTOR GRAF, was a 59-year-old resident of California. He began receiving SSDI benefits in 1977 because of residuals of three severe heart attacks and triple bypass open heart surgery. In July 1982 the Social Security Administration informed him it was terminating his benefits even though there had been no improvement in his condition. Prior to the

termination action, he had received $625 monthly SSDI and two other disability pensions which were payable only if he received SSDI and Medicare. MR. GRAF became severely upset when he received his termination notice from Social Security, and he went to his doctor to obtain documentation of the severity of his condition. His doctor notified the Administration that MR. GRAF had marked damage of the left ventricle of his heart resulting in a large akinetic heart documented by electrocardiographic studies. The doctor further verified that MR. GRAF required multiple medications and constantly was in risk of death from heart failure. On August 2, 1982, MR. GRAF died of a fourth heart attack. In spite of the news of MR. GRAF'S death and receipt of his doctor's report, the Social Security upheld its original determination that MR. GRAF was not disabled as of July 1982.

6. EDDIE HARRIS was a resident of North Carolina who suffered from a heart attack and subsequent open heart surgery. He had been receiving SSDI since 1974. His SSDI benefits of $569 per month for himself and $400 per month for his four dependent children were terminated in September 1981. At the time of termination of his benefits his condition had deteriorated, and he no longer was able to afford to pay for his necessities of life or for the medical treatment and medication he needed to survive. MR. HARRIS appealed his termination of benefits by requesting a hearing before an administrative law judge which was subsequently held on November 2, 1981. Needing income to pay for his necessities of life, MR. HARRIS attempted to work as janitor

for a church but had to quit after three weeks due to severe chest pains. On March 8, 1982, MR. HARRIS dies of a heart attack. One month after his death a favorable decision was issued by the administrative law judge holding that MR. HARRIS' disability had continued until the date of his death.

7. MARTIN LEE MAULDWIN was a resident of North Carolina who suffered from residuals of a heart attack, asthma, emphysema and liver disorder. He had been receiving SSDI since 1975. His SSDI benefits of $300 per month were terminated in June 1982. At the time of termination of his benefits his condition had deteriorated to the point that he was kept alive by extensive medications. On July 6, 1982, one month after the Social Security Administration decided to terminate his benefits MARTIN LEE MAULDWIN died of a heart attack.

8. JOHN RANKIN was a resident of North Carolina who suffered from severe arterial sclerotic heart disease and residuals of myocardial infarctions and recurrent angina, requiring open heart surgery in February 1977. He had been receiving SSDI since 1977. His SSDI benefits of $588 per month were terminated in September 1982. At the time of termination of his benefits, his condition had deteriorated to the point that he had to be hospitalized. MR. RANKIN appealed the termination of his benefits. On March 2, 1983, JOHN RANKIN died of a heart attack. To date the Social Security Administration has not issued a decision on MR. RANKIN'S appeal.

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9. FORREST SISK was a resident of North Carolina who suffered from three heart attacks and subsequent open heart surgery for five bypasses. He had been receiving SSDI since 1981. His SSDI benefits of $285 per month were terminated in June 1982. At the time of termination of his benefits his condition had deteriorated to the point that he was kept alive solely by medication which cost $200 per month. On August 9, 1982, two months after the Social Security Administration decided to terminate his benefits, FORREST SISK died of a heart attack, his fourth within a three-year period.

10. DEANE WITT was a resident of Arizona who suffered from acute myocardial infarction, arteriosclerotic heart disease, ischemic heart disease, angina pectoris, residuals of a cerebrovascular accident, impaired vision, hypertension, diabetes mellitis, and depression with suicidal ideation. He had been receiving SSDI benefits of $525 per month which were terminated in January 1982. At the time of termination of his benefits his conditions had deteriorated severely. On July 1, 1982, DEANE WITT died. On July 30, 1982, and administrative law judge for the Social Security Administration issued a favorable decision holding that MR. WITT's disability had continued until the date of his death.

(Subcommittee note: Complete exhibits retained in Subcommittee's files.)

UNIVERSITY of PENNSYLVANIA
PHILADELPHIA 19104

The Law School
3400 Chestnut Street I4

June 17, 1983

Hon. William S. Cohen, Chairman
Subcommittee on Oversight of Government
  Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Cohen:

On June 8, 1983, I testified before the Subcommittee regarding Section 9 of S. 476 (98th Cong., 1st Sess.). Since I was unable to submit a written statement to you prior to my testimony, I thought it might be useful for me briefly to summarize my thoughts on paper at this time. You may, if you wish, incorporate this letter in the hearing record.

1. Section 9 of S. 476 seeks to require the Department of Health and Human Services to acquiesce in United States Court of Appeals decisions interpreting the Social Security Act (or regulations thereunder) when Supreme Court review of such decisions is not obtained. In my view, Congress generally has the constitutional authority to require such acquiescence. Congress unquestionably has the right to establish the substantive law governing the Department as well as the procedures and rules of decision to be followed by the Department in applying that law. A rule requiring the Department to follow applicable judicial interpretations would seem to me to be a valid--and appropriate--rule of decision to impose upon the Department.

   It does not seem to me to be especially relevant, in this connection, for Congress to resolve the question of whether the Department's policy of non-acquiescence is or is not a constitutional policy. The critical question for your purposes is not whether the Department is acting constitutionally, but whether it is acting lawfully and appropriately in administering the Social Security Act.

2. If there is any constitutional doubt about Congress' power to enact Section 9, those doubts might relate to the constitutional propriety of Congress purporting to require the Department to appeal certain cases. It might be thought that the decision whether or not to take on appeal in a particular case might properly be an Executive prerogative. I would suggest, therefore, that the title of Section 9 be changed from "Mandatory Appeal By Secretary of Certain Court Cases" to "Acquiescence by Secretary in Certain Court Decisions." Further, the language in lines 19-21 of Section 9 might be changed from "must either acquiesce . . . or must request review . . . " to "must acquiesce . . . unless it requests review." Congress, then, would not be requiring the Secretary to appeal, but would be describing the consequences if the Secretary decides not to appeal. It seems to me that, in fact, your main purpose is to describe the consequences of non-appeal, rather than actually to require appeals.

3. The current draft of Section 9 would apparently require nationwide acquiescence in a single unappealed Court of Appeals decision, rather than merely requiring acquiescence within the Circuit governed by that Court of Appeals. Although it may be within the prerogatives of Congress to require such nationwide acquiescence in a single Circuit's ruling, such a policy strikes me as unwise. Court of Appeals rulings are not invariably correct. If the Department receives a decision with which it disagrees the Supreme Court is not necessarily going to accept review if the Department files a petition for certiorari. Indeed, the likelihood is that the Supreme Court will deny certiorari in many such cases unless a conflict ultimately develops between different Courts of Appeals. I think the Department is properly entitled to relitigate a question in other Circuits in order to try to obtain a contrary decision, thus creating such a conflict for the Supreme Court to resolve. In line 20, I would therefore add language after the word "beneficiaries" to make clear that acquiescence is required only within the Circuit involved. Lines 19 and 20 might thus read: "must acquiesce in such decision with respect to all beneficiaries whose appeals would be within the jurisdiction of that Court of Appeals. . . ."

4. The present draft of Section 9 does not make clear what the consequences are to be if the Department files a petition for certiorari, but that petition is denied. As presently written, the Section might be construed to excuse the Department from acquiescence in those circumstances. Such a

result would be unfortunate in my view. I would think that the acquiescence obligation would apply when certiorari is denied, just as when certiorari is not sought.

A subsidiary question has to do with the obligation to acquiesce while a petition for certiorari is pending. If you wish to require acquiescence during that time (as well as after denial of certiorari, when that occurs) you might re-write lines 19-23 to say that the Department "must acquiesce . . . unless the Supreme Court of the United States grants a petition for review." If you do not wish to require acquiescence while a certiorari petition is pending you might re-write lines 19-23 to say that the Department "must acquiesce . . . unless it makes a timely request for review of such decision by the Supreme Court. . . . If review is sought and denied, the Secretary must acquiesce from and after the date of denial of Supreme Court review."

5. The non-retroactivity provision contained in Section 9(b) seems to me to be unwisely overbroad. There is no reason, in my view, to excuse the Department from acquiescence in Court of Appeals decisions merely because those decisions have already been rendered, so long as such decisions have not been reversed by the Supreme Court. Indeed, the more long-standing a Circuit decision (without a conflict having developed in other Circuits) the more powerful the reasons for Departmental acquiescence.

There may be good reason to excuse the Department from reopening particular individual claims that have already been administratively resolved under the current non-acquiescence policy. If so, § 9(b) could read: "The provisions of this section shall not apply to the claims of any beneficiary when such claims have been finally resolved by the Department prior to the date of the enactment of this Act."

Thank you again for asking me to testify before the Subcommittee regarding this legislation. The problems are extremely important and interesting and I have enjoyed thinking about them. I commend you for your enormously useful initiatives in this area.

Sincerely yours,

Paul Bender

Paul Bender
Professor of Law

PB:km

cc: Hon. Carl Levin

Senator **Cohen**. Thank you very much. The subcommittee will stand adjourned.

[Whereupon, at 1:20 p.m., the subcommittee was adjourned, subject to reconvene at the call of the Chair.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

STATEMENT OF SENATOR JIM SASSER

We have all heard the recent horror stories about the elimination of social security benefits for certain mentally or physically handicapped Americans whose disabilities prevent them from earning a living for themselves and their families. These purges are in response to Public Law 96-265 enacted by Congress in 1980 to require reviews by the Social Security Administration of all non-permanently disabled beneficaries once every three years.

In implementing this law, the Reagan administration has removed 340,000 individuals from the disability insurance program since March of 1981. For the fiscal year, another 640,000 disabled recipients are up for review. As many as 40 percent of these cases may lose their benefits if the current trend continues.

I am pleased to note that Secretary Margaret Heckler of the Department of Health and Human Services has announced that the procedures for pruning the disability rolls will be revamped. This is a step forward and I await those new regulations for consideration.

But the real key to a fair and equitable SSA disability review system is the independence and discretion of the administrative law judges who decide these cases.

Unfortunately, we have reports that the administration, using an authority enacted by Congress in 1980 for the Secretary of HHS to review "a sample of decisions made by administrative law judges, when those decisions are in favor of the claimant," may be pressuring ALJ's to deny most claims.

That is why the subcommittee is conducting this very timely hearing on the possible harrassment of ALJ's to comply with Social Security Administration "quotas" on the denial of disability cases. Favorable decisions by an ALJ are subject to reversal. Too many favorable decisions make the ALJ subject to the Bellmon review, where 100 percent of the ALJ's cases may be reviewed and the ALJ is forced to come to Washington for "re-training."

A recent one year "classification study" of administrative law judges and other Government legal personnel may be related to this harrassment. The study procedures allow the Office of Personnel Management to "freeze" promotions for ALJ's although this has never before been done for any professional group within the Government.

Last February, Senators Levin, Pryor and myself wrote to Don Devine, the Director of the Office of Personnel Management, concerning this classification study. I submit a copy of our letter on this subject for the record. I request that it be published at the close of my remarks.

In sum, then, I applaud the Subcommittee on Oversight of Government Management for holding this hearing to look into whether or not the independence of the administrative law judges at the Social Security Administration has been encroached upon by productivity quotas and other performance standards. I am pleased that some steps are already being taken by SSA and the Reagan administration to improve this situation. But more needs to be done.

U.S. SENATE,
Washington, D.C., February 24, 1983.

Hon. DONALD J. DEVINE,
Director, Office of Management and Personnel,
Washington, D.C.

DEAR MR. DEVINE: We understand that the Office of Personnel Management (OPM), pursuant to a letter of February 9, 1983, has initiated a one year "classification" study of Administrative Law Judges (ALJ's) and other government legal personnel. During the time that OPM proposes to conduct this study, OPM has taken other actions that have the cumulative effect of preventing any upgrading of ALJ classifications and the filling of vacant ALJ positions at the GS-16 level.

We are vitally concerned that these pending actions can have a demoralizing effect on the Administrative Law Judge Corps. And we are most distressed that this action could portent an effort by the Office of Personnel Management to downgrade Administrative Law Judges in violation of the letter and spirit of the laws governing classification of these federal employees. In light of the duties and responsibilities of Administrative Law Judges, any effort to down-grade these positions would be disruptive of the personnel standards set forth in U.S.C. 5, sections 5105, 5106, and 5341, as they apply to ALJs, most of which are classified at a GS-15 and GS-16 level.

Furthermore, the type of action suggested in the February 9th letter may run afoul of the Administrative Procedure Act (APA) which recognizes the independence of Administrative Law Judges. The comprehensive scheme of administrative adjudication established by the Administrative Procedures Act provides for an independent and impartial corps of Administrative Law Judges. Actions such as that contemplated in the cited OPM letter raise the possibility that OPM may be violating the rights of ALJ's to be secure in their tenure and compensation as provided for by 5 U.S.C. 7521.

In particular, we are extremely distressed at the impact that a reclassification study may have on the more than 300 ALJ's employed by the Department of Health and Human Services. These ALJ's are working under extreme pressures to review Social Security Disability claims and determinations under the Social Security Act. It is estimated that these 800 or so ALJ's will carry the heavy responsibility of hearing some 422,000 disability cases during 1983. With normal turnover of HHS ALJ's running about 40 per year, it is clear to us that any potential downgrading actions would add tremendously to an already heavy workload and have a devastating effect on the Social Security disability review process. Our concern about an adverse classification action is further heightened due to the pending suit brought by the HHS ALJ's against the Social Security Administration, *Association of Administrative Law Judges, Inc.* v. *Richard S. Schweiker et. al.*

Thus, we strongly recommend that the Office of Personnel Management rescind the actions contained in the February 9th letter to the Honorable Charles N. Bono and suspend the decision to conduct the proposed classification study unitl OPM officials have met with representatives of the Senate Governmental Affairs Committee to review the merits of such a proposed classification study. Such a meeting is necessary in order to determine and confirm to our satisfaction that the proposed classification study will not in any way adversely affect the independence and impartiality of the Administrative Law Judges Corps nor violate the statutory guidelines for classification procedures as they pertain to Administrative Law Judges.

We look forward to your prompt reply to this letter.

Sincerely,

JIM SASSER, *U.S. Senator.*
DAVID PRYOR, *U.S. Senator.*
CARL LEVIN, *U.S. Senator.*

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
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SUSAN M. COLLINS, STAFF DIRECTOR

May 9, 1983

The Honorable John A. Svahn
Commissioner
Social Security Administration
Baltimore, Maryland 21235

Dear Mr. Svahn:

On June 8, 1983, the Senate Subcommittee on Oversight of Government Management of the Governmental Affairs Committee will hold a hearing on the current status of Administrative Law Judges in the Social Security Disability Program. In order to facilitate obtaining the most pertinent information, we are requesting that you provide us with the reports and information listed below by May 23, 1983. We have divided our request into subject categories for your convenience.

I. Reports

In an effort to secure all the documents relevant to our hearing, we are requesting that you furnish us with copies of the following reports:

(a) All reports and studies done by SSA on ALJ's for the past 5 years (1979-1983);

(b) All reports and documents prepared by SSA for the past 5 years on the following subjects:

(i) ALJ performance guidelines,

(ii) ALJ performance analyses, including any state-by-state comparative analyses of ALJ performance,

(iii) ALJ hiring and selection criteria, including the number of ALJ's hired by the agency in accordance with these criteria for each of the past five years,

(iv) Chief ALJ selection and promotion criteria,

(v) Monitoring of ALJ decisions,

(vi) The caseload of ALJ's, including information on how that caseload is determined and evaluated,

(vii) Disciplinary actions and recommendations against ALJ's,

(viii) Counselling and retraining programs for ALJ's, including information on how these programs operate, their particular goals and objectives, their location and duration, any follow-up activities, their success rate (and how that rate is determined), the prerequisites for participation and how many ALJ's have participated.

(c) All memos and announcements from the national Office of Hearings and Appeals to ALJ's in the field for the past three years.

II. Social Security Disability Rulings

(a) SSA has announced that the agency is attempting to incorporate the POMS into SSA rulings in an effort to achieve more uniformity in the standards for disability determinations. In this regard, please provide us with copies of all SSA rulings incorporating POMS provisions. In addition we would like to know to what extent ALJ's are required to follow SSA rulings, and the legal basis for making these rulings binding upon the ALJ's.

(b) Please provide us with copies of SSA Rulings for the past five years pertaining to decisions by SSA to not acquiesce to court decisions.

III. Case Disposition Time Limits

There has been a significant increase in the number of cases decided by ALJ's over the past few years. This increase has a direct relationship to the time that a judge can spend on each case, which may or may not affect the quality of the resulting decision. Thus, we feel that it is important that we know the following:

(a) the recommended time limits for ALJ case disposition;

(b) whether there have been any changes in the recommended time limits over the past five years and, if so, please outline those changes;

(c) the percentage and numerical increase in the caseload for each judge over the past five years;

(d) the number of cases recommended by SSA to be decided by an ALJ on a monthly basis and the agency rationale in support of that figure. Please note any changes in the past five years.

IV. Appeals Council Reviews

The Appeals Council reviews certain ALJ decisions. In an attempt to get a complete picture of the current review process, please provide data for the questions listed below.

(a) How many and what percentage of ALJ decisions have been reviewed by the Appeals Council for each of the last five years? (In providing these statistics please differentiate between ALJ allowances and ALJ termination decisions.)

(b) What criteria are used by the Appeals Council to select a case for review?

(c) What is the SSA's recommended time limit for the disposition of a case sent to the Appeals Council, and have there been any changes in this recommendation over the past five years? (If so, please state the change, and the year such change was made.)

(d) What is the average time taken by the Appeals Council for the disposal of a case; and

(e) How many and what percentage of cases reviewed by the Appeals Council were remanded to the ALJ for each of the past five years?

V. "Visiting Judge" Assignments

Due to the increase in the caseload and a resulting backlog, the "visiting judge" program was instituted by SSA. We would like to find out more about this program. In this regard please provide us with the information on the following questions:

(a) How often are ALJ's required to take "visiting judge" assignments?

(b) How many cases is an ALJ required to handle during any one "visiting judge" assignment, and how is this caseload determined?

(c) How long do "visiting judge" assignments last?

(d) What is the agency's recommended time limit for the disposition of cases received during a "visiting judge" assignment, and where is the work on these decisions done after the "visiting judge" has returned to his permanent assignment?

(e) What is the average time taken by ALJ's to dispose of "visiting judge" cases?

(f) What arrangements, if any, are made to take care of, and monitor the progress of an ALJ's own cases while he/she is on a "visiting judge" assignment?

(g) How are judges selected for "visiting judge" assignments?

VI. The Bellmon Review

In 1980 the Bellmon Amendment was enacted to require the review of certain decisions made by ALJ's. In an effort to understand the impact that this review procedure is having, we are requesting the following data:

(a) For 1981, 1982 and 1983, please give the number of ALJ's that have been reviewed under the Bellmon Amendment.

(b) What is the standard or the criteria used for determining which ALJ's are to be reviewed and as to each ALJ, which decisions are to be reviewed?

(c) What percentage of cases of each ALJ's decisions are reviewed?

(d) What action, if any, is taken pursuant to the completion of a review under the Bellmon Amendment?

VII. Disciplinary Actions

We would like some information about disciplinary actions that have been taken by the agency against ALJ's. Please answer the following questions:

(a) How many ALJ's have been recommended for disciplinary actions in each of the past five years, and on what grounds were these recommendations made?

(b) How many ALJ's have been subject to disciplinary actions for each of the past five years?

(c) What type of disciplinary action was taken by the agency against each ALJ?

(d) In how many disciplinary actions during the past five years has SSA sought dismissal; what was the basis for seeking dismissal, and how many ALJ's were actually terminated?

(e) Please provide us with copies of all Federal District and Appellate Court cases in which the termination or disciplinary action of an ALJ was at issue. For those cases where settlements were made, please provide copies of the settlement agreements.

VIII. Agency and ALJ Interaction

We are interested in understanding how ALJ's interact with the agency and vica versa. Please provide us with a description of the method used to communicate with ALJ's in the field, the frequency and topics of such communications and the organizational structure of the Office of Hearings and Appeals.

IX. Continuing Disability Investigations

We would like to be updated on the following statistics related to the continuing disability reviews. Please provide this information by years and provide percentage figures, where possible, in addition to numerical totals.

1. How many individuals have been reviewed since March 1981?

2. Of those reviewed, how many have received a final decision of termination; how many have been continued; and how many have died?

3. Of those reviewed please provide figures for the various levels of appeals --

   - number initially terminated
   - number seeking reconsideration
   - number terminated after reconsideration
   - number appealing to an ALJ
   - number terminated by an ALJ
   - number subject to review by Appeals Council
   - number terminated by Appeals Council
   - number remanded to an ALJ
   - number terminated by an ALJ.

Finally, we would like to know if SSA has any current recommendation for changing the relationship between the ALJ's and the agency, or the function that the ALJ's presently fulfil. If there are reports on these matters, please include them with the other materials that we have requested.

We realize that we have requested a great deal of information from your office. However, in view of the pressing need for this information, we look forward to hearing from you as soon as possible. If you or your office have any questions, please contact Claudette Humphreys at 224-3682 or Susan Collins at 224-5538. The information should be sent or delivered to the Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, SD-326, Washington, D.C. 20510.

Sincerely,

Bill Cohen
William S. Cohen
Chairman

Carl Levin
Carl Levin
Ranking Minority Member

WSC:CL:cd

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND 21235

OFFICE OF THE COMMISSIONER

REFER TO SRP-32

Chairman William S. Cohen
Ranking Minority Member Carl Levin
Subcommittee on Oversight of Government
Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Cohen and Senator Levin:

Enclosed are materials in response to your May 9, 1983 request for documents and information relating to your upcoming oversight hearing on the role of the administrative law judge in the Social Security disability program. I believe that the enclosed responses and documents respond to the subcommittee's particular interests and concerns as outlined in your May 9 request and as amplified in discussions between our staffs.

Sincerely,

Paul B. Simmons
Acting Commissioner

Enclosures

Subcommittee note: Those materials listed in the following which are not included in the hearing record are retained in the Subcommittee's files.

I. Reports

In an effort to secure all the documents relevant to our hearing, we are requesting that you furnish us with copies of the following reports:

(a) All reports and studies done by SSA on ALJ's for the past 5 years (1979-1983);

Attached are copies of the Office of Hearings and Appeals (OHA) Annual Reports, a sample of each of OHA's recurring statistical reports, and copies of several OHA Special Study Reports. Hard copies of OHA's statistical reports are only kept for 2 years and then are put on microfilm.

Annual Reports

OHA Operational Reports for fiscal years 1979, 1980, 1981, and 1982.

Statistical Reports

1. Key Workload Indicators Report--Prepared monthly and for total fiscal year beginning FY 1980.
2. ALJ and Hearing Office Statistics--Prepared annually for FY 1981 and FY 1982.
3. OHA Case Control Systems Reports:

   OHA-CCS-014--Production Report Administrative Law Judges

   OHA-CCS-036--Hearing Office Dispositions by Physical Location

   OHA-CCS-048--ALJ Quarterly Production

   OHA-CCS-100--Quarterly Report of Hearing Office Workload (on microfilm for FY 1979 and FY 1980; hard copy for first and fourth quarters of FY 1981 and all of FY 1982)

   OHA-CCS-118--Historical Report of ALJ Reversal Rates Excluding Dismissals (report was initiated end of 1979)

Special Study Reports

1. Production Among Bellmon Targeted ALJ's; Processing Time and Pending Case Data for HO's with at Least Two Targeted ALJ's
2. Characteristics of the "Ideal" Hearing Office, FY 1980
3. Study of the Effect of Staff Attorney Support on ALJ Decisional Quality

(b) All reports and documents prepared by SSA for the past 5 years on the following subjects:

(i) ALJ performance guidelines,

SSA does not have any ALJ performance guidelines. For a further discussion of this subject, see our response to III(d).

I-b-i

(ii) ALJ performance analyses, including any state-by-state comparative analyses of ALJ performance,

The attached reports and documents are:

1. Disposition Rates and Reversal Rates, FY 1982
2. State by State breakdown of ALJ Receipts and Dispositions for Last 3 Quarters of FY 1982.
3. Report on Special Case Study to Examine ALJ Compliance with Current CDI Policy
4. Data on ALJ Compliance with Current CDI Policy through the Bellmon Review
5. Report on the "Uniformity of Disability Allowance Rates (Reversal Rates) Among Administrative Law Judges"
6. Data on ALJ Compliance with the New CDI Policy through the Bellmon Review
7. Individual ALJ Reversal Rates
8. Report on Quality Review for October through December 1980
9. Processing Time Profile
10. Proposed Processing Time Regulations
11. Follow-up Review of Selected Low Allowance Rate ALJ Decisions
12. Ongoing Report of Study of OHA Standardized Text Guide
13. Study of ALJ Allowance Decisions (in Disability Claims) That Do Not State the Specific Regulatory Basis for the Favorable Conclusion

Attachments

I-b-ii

(c) All memorandums and announcements from the national office of Hearings and Appeals to ALJ's in the field for the past 3 years

The attached memorandums are:

1. March 1983 Regional Average Disposition Rates (4/4/83)

2-3. Face-to-Face Reconsideration in Disability Termination Cases (3/25/83 and 1/10/83)

4. ALJ Voluntary Transfer Policy (12/21/82)

5-8. ALJ Transfer Opportunities (7/11/82, 11/5/80, 6/24/80, 3/28/80, 1/2/80)

9. Referral of Hearing Decisions for Consideration as Possible Social Security Rulings (12/15/82)

10. Description of the Bellmon Own-Motion Review Program (9/24/82)

11. Aged (Backlogged) Cases (5/6/82)

12. Report to Congress on the "Bellmon Study" (3/19/82)

13. Ruling of Nonacquiescence--Continuance or Cessation of Grandfatheree's Disability (2/23/82)

14. FY 1981 Workloads and Comparison to FY 1980 (12/6/81)

15. Hearing Office Reconfiguration (12/1/81)

16. Critical Challenges Facing the Office of Hearings and Appeals (11/2/81)

17. Associate Commissioner's Statement of Social Security Subcommittee Hearing (10/26/81)

18. Field Training Initiative Staff (10/9/81)

19. Hearing Office Innovation Staff (9/18/81)

20. Associate Commissioner Hays' Initial Address to ALJ's (7/21/81)

21-22. Memoranda Addressing Case Backlogs (5/27/81 and 2/25/81)

23. Accelerated CDI Program--Impact on OHA (5/7/81)

24. ALJ Rationale in Fully-Favorable Decisions and Review of Decisions under the Bellmon Amendment (12/19/80)

25. ALJ Voluntary Transfer Policy (7/1/80)

26. Notice of Proposed Rule Making: Time Limitation for Holding Hearing, Issuing Hearing Decision and Action by the Appeals Council (5/5/80)

27. Region II--Court Impacted Caseload (4/14/80)

Attachments

(iii) ALJ hiring and selection criteria, including the number of ALJ's hired by the agency in accordance with these criteria for each of the past 5 years,

SSA does not establish ALJ hiring and selection criteria. The Office of Personnel Management (OPM) administers the examination process for ALJ positions Government-wide. (Attached is a copy of OPM Announcement No. 318 which states the basic eligibility requirements for GS-15 ALJ positions.)

Once OPM determines that an applicant meets all of the qualification requirements, they assign the applicant a numerical rating (including veteran's preference if applicable) and place the applicant on their ALJ register. When OHA determines it has a need to fill ALJ positions, a request is made to OPM. OPM reviews the list of qualified applicants whose names have been placed on their register and submits a roster of eligible candidates to OHA. The number of names submitted by OPM, in numerical rating order, depends on the number of vacancies available.

OHA then contacts individuals to determine their availability for geographical locations and OHA considers the individuals for the positions in accordance with OPM's "rule of three;" i.e., one out of every three individuals must be selected and a non-veteran may not be selected over a veteran. OHA conducts interviews with each applicant and final selections are made by the Associate Commissioner, OHA.

The following table shows the number of ALJ's hired by OHA during the past 5 years.

Calendar Year Hired	Number of ALJ's Appointed
1979	34
1980	87
1981	50
1982	100
1983	0

Attachment

I.(b)(iii)

(iv) Chief ALJ selection and promotion criteria.

There are no agency selection or promotion criteria for the positions of Chief Administrative Law Judge or Regional Chief Administrative Law Judge.

To be eligible for the Chief Administrative Law Judge position, an individual must meet the qualification and eligibility standards for GS-16 administrative law judge positions as established by the Office of Administrative Law Judge, Office of Personnel Management. Any selection made by an agency requires the approval of the Office of Personnel Management. When the last selection of an individual to be the OHA Chief Administrative Law Judge was made, in early 1976, the agency issued no formal selection standards.

The position of Regional Chief Administrative Law Judge is classified at the GS-15 level (as are all administrative law judge positions in this agency except that of the Chief Administrative Law Judge). The selection process followed involves an announcement of the vacancy and final selection by the Associate Commissioner. Any selection also requires the approval of the Office of Personnel Management. We do not maintain copies of these announcements for an indefinite period.

I-b-iv

(v) Monitoring of ALJ decisions,

With the exception of the Appeals Council review of appealed denials and of allowance decisions under the Bellmon Amendment, SSA does not monitor ALJ decisions. A detailed description of the Appeals Council review is provided in the responses to IV and VI. Attached is the most recent monthly report compiled on the Bellmon review.

Attachment

(Subcommittee note: See subcommittee listing of SSA Reports and Memoranda Monitoring ALJ Decisions in Additional Material section of hearing record)

(vi) The caseload of ALJ's, including information on how that caseload is determined and evaluated,

The caseload of ALJ's is determined by the number of requests for review (receipts) filed by claimants within a Hearing Office service area and the number of ALJ's within that office. In order to balance the workload, to meet court ordered time limits and to provide timely service to claimants, ALJ's from offices with smaller workloads travel and hear cases for offices with larger backlogs as necessary. Both receipts and dispositions are estimated and projected into the future on a regular basis and staff resources, including ALJ's, are placed in those offices most in need as resources become available. The reports included in the response to I (a) reflect the caseload of ALJ's for the last several years.

I. (b)(vi)

(vii) Disciplinary actions and recommendations against ALJ's,

The information is included in the response to VII.

I.(b)(vii)

(viii) Counselling and retraining programs for ALJ's, including information on how these programs operate, their particular goals and objectives, their location and duration, any follow-up activities, their success rate (and how that rate is determined), the prerequisites for participation and how many ALJ's have participated.

In May 1982, OHA began a series of Continuing Legal Education seminars for all ALJs who entered on duty prior to FY 1982. The purpose of this training program was to familiarize the ALJs with a series of Social Security Rulings being published that set forth the Agency's basic disability program policy. The subjects discussed during these 3-day sessions included (1) sequential evaluation of disability, (2) evaluation of evidence and determining credibility of testimony, (3) use of vocational experts - when to call one and how to question him/her, and (4) standards for determining when a claimant's disability has ceased.

Approximantely 700 ALJs attended 19 seminars which were held throughout the country, concluding with a "make up" session in Arlington, Virginia. The 139 ALJs who were hired during FY 1982 received the same training as part of their orientation program.

We plan to conduct a new round of training beginning in FY 1984 concentrating on medical evaluation with emphasis on musculoskeletal and psychiatric impairments.

Although under our Bellmon review program we established a system for providing feedback and counselling to individual ALJ's, it has not been implemented. Attached is a copy of a memorandum describing the Bellmon review feedback system.

Attachment

I-b-viii

II. Social Security Disability Rulings

(a) SSA has announced that the agency is attempting to incorporate the POMs into SSA rulings in an effort to achieve more uniformity in the standards for disability determinations. In this regard, please provide us with copies of all SSA rulings incorporating POMS provisions. In addition we would like to know to what extent ALJ's are required to follow SSA rulings, and the legal basis for making these rulings binding upon the ALJ's.

The requested rulings are attached.

Each ruling is carefully reviewed by SSA's Office of the General Counsel to assure that it is fully consistent with existing law and regulations. The rulings provide background details and a fuller explanation of the standards in regulations. Under 20 CFR 422.408, the rulings are binding on all components of SSA, including ALJ's and the Appeals Council.

Attachments

II.(a)

(b) Please provide us with copies of SSA Rulings for the past 5 years pertaining to decisions by SSA to not acquiesce to court decisions.

Attached are copies of all nonacquiescence rulings for the past 5 years.

Attachments

II.(b)

III. Case Disposition Time Limits

There has been a significant increase in the number of cases decided by ALJs over the past few years. This increase has a direct relationship to the time that a judge can spend on each case, which may or may not affect the quality of the resulting decision. Thus, we feel that it is important that we know the following:

(a) the recommended time limits for ALJ case disposition;

With one exception, SSA does not have any recommended time limits for ALJ dispositions. We do, however, encourage ALJ's to handle cases as expeditously as possible.

The one exception is that the hearing decision in SSI non-disability cases must be issued no later than 90 days after the request for hearing is filed unless there is good cause for extending the time period.

III. (a)

(b) whether there have been any changes in the recommended time limits over the past 5 years and, if so, please outline those changes;

No. As you know, however, a number of Federal courts have ordered SSA to render hearing decisions within specified time limits.

III. (b)

(c) the percentage and numerical increase in the caseload for each judge over the past 5 years;

	Average Number of Receipts Per ALJ 1/	Change From Prior FY Number	Change From Prior FY Percent
FY 1979	345	+46	+15.4%
FY 1980	377	+32	+ 9.3%
FY 1981	403	+26	+ 6.9%
FY 1982	425	+22	+ 5.5%
FY 1983 2/	213	N/A	N/A

1/ Represents total hearing requests divided by the average number of ALJ's on duty during the fiscal year.

2/ First 6 months only and does not include quarterly adjustment.

III. (c)

(d) the number of cases recommended by SSA to be decided by an ALJ on a monthly basis and the agency rationale in support of that figure. Please note any changes in the past 5 years.

In the past 5 years, SSA has not required an ALJ to decide a specific number of cases of a monthly basis. However, after consultation with the Regional Chief Administrative Law Judges, the Associate Commissioner of OHA has established personal goals for what he believes the entire corps of ALJ's could achieve. These goals were to attain a national average disposition rate of 40 final dispositions per month by September 1982 and 45 by September 1983. This general objective was based upon projected receipts of requests for hearings, the estimated size of the corps and an estimate of expected productivity increases to be achieved as a result of initiatives such as increasing the size of the ALJ support staff and purchasing state-of-the-art word processing equipment for the hearing offices.

SSA does require all ALJ's to perform at a minimally acceptable level of efficiency and proficiency. All ALJ's (excluding those who have been on duty less than 1 year) whose production average 20 or fewer final dispositions per month for the prior 6 months are notified that their disposition rate is considerably below the norm and are asked to improve their productivity and to advise their RCALJ's of any assistance they require to improve their performance. An average disposition of 20 cases per month is not a standard, but merely an indication that the ALJ's in question are performing at a level signficantly below that of their peers. The question of whether an individual ALJ's disposition rate is minimally acceptable is decided only after consideration of all the facts, including extenuating circumstances which may explain his low productivity.

III. (d)

IV. Appeals Council Reviews

The Appeals Council reviews certain ALJ decisions. In an attempt to get a complete picture of the current review process, please provide data for the questions listed below.

(a) How many and what percentage of ALJ decisions have been reviewed by the Appeals Council for each of the last five years? (In providing these statistics please differentiate between ALJ allowances and ALJ termination decisions.)

The following table includes initial entitlement decisions as well as termination decisions. We do not have separate statistics for these categories.

	Number of ALJ denial decisions 1/	Number of case reviews by the A/C	Percentage reviewed
FY-82	111,064	65,559	58% 2/
FY-81	91,490	54,095	59%
FY-80	80,324	49,466	62%
FY-79	79,350	53,566	68%
FY-78	85,976	48,900	57%

	Number of ALJ allowance decisions	Number of decisions reviewed by A/C	Percentage reviewed
FY-82	156,349	12,236	8%
FY-81	144,830	3/	3/
FY-80	129,713	3/	3/
FY-79	111,629	3/	3/
FY-78	106,220	3/	3/

1/ Does not include dismissals.

2/ In computing the percentage, 1,300 final A/C actions resulting from own motion review by the A/C of ALJ allowance decisions were deducted.

3/ Implementation of the on-going review of ALJ allowance decisions required by the Bellmon Amendment began in FY1982.

(b) What criteria are used by the Appeals Council to select a case for review?

When a claimant files a request for review of an unfavorable or partially favorable ALJ decision, the case must be formally acted upon by the Appeals Council. The request may be dismissed, denied, or granted by the Appeals Council. Section 404.970, Social Security Administration Regulations No. 4 (20 CFR 404.970) provides that the Appeals Council will review a case if:

1. There appears to be an abuse of discretion by the administrative law judge;
2. There is an error of law;
3. The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or
4. There is a broad policy or procedural issue that may affect the general public interest.

The same regulatory criteria apply for reviewing a favorable ALJ decision on Appeals Council own-motion review.

IV. (b)

(c) What is the SSA's recommended time limit for the disposition of a case sent to the Appeals Council, and have there been any changes in this recommendation over the past 5 years? (If so, please state the change and the year such change was made.)

In the latter part of 1979, internal time processing goals were adopted which generally established a 90 day time limit for denying, dismissing, or granting a claimant's request for review and a 30 day time limit for issuing a decision or a remand order after a request for review had been granted. Own-motion review on all favorable ALJ decisions must be taken within 60 days as required by Section 404.969 of Social Security Administration Regulations No. 4 (20 CFR 404.969). No changes in these goals or regulations have taken place over the past 5 years.

IV. (c)

(d) What is the average time taken by the Appeals Council for the disposal of a case;

The following information refers to ALJ denial decisions which were appealed by claimants. The time runs from the date the claimant filed a request for review until the date the Appeals Council took its final action.

FY-82	Not Available
FY-81	67 days
FY-80	66 days
FY-79	72 days
FY-78	75 days

IV. (d)

(e) How many and what percentage of cases reviewed by the Appeals Council were remanded to the ALJ for each of the past 5 years?

	Number of processed by A/C	Number of Remands	Percentage
FY-82	63,559	4,883	8%
FY-81	54,095	4,106	8%
FY-80	49,466	3,917	8%
FY-79	53,566	3,874	7%
FY-78	48,900	1.863	4%

IV. (e)

V. "Visiting Judge" Assignments

Due to the increase in the caseload and a resulting backlog, the "visiting judge" program was instituted by SSA. We would like to find out more about this program. In this regard please provide us with the information on the following questions:

(a) How often are ALJ's required to take "visiting judge" assignments?

ALJ's are not routinely required to take out-of-office assignments. Travel outside an ALJ's own service area is requested only when workloads in that area are comparatively low and those in other areas are high. Usually there are a sufficient number of ALJ's volunteering for travel assignments.

To further enhance our ability to deal with flunctuating caseloads, we recently established three Regional Hearing Offices and a National Hearing Office. The sole responsibility of the ALJ's in these offices is to assist heavily backlogged offices.

V. (a)

(b) How many cases is an ALJ required to handle during any one "visiting judge" assignment, and how is the caseload determined?

There is no requirement as to the number of cases for such assignments. A general rule of thumb, however, is that 25-30 cases should be scheduled for a week-long assignment in which travel time is not significant.

V. (b)

(c) How long do "visiting judge" assignments last?

Trips are usually for 1 week, although in some regions ALJ's are asked to take 2-week trips, if circumstances and economy so dictate.

V. (c)

(d) What is the agency's recommended time limit for the disposition of cases received during a "visiting judge" assignment, and where is the work on these decisions done after the "visiting judge" has returned to his permanent assignment?

The agency does not distinguish between "visiting judge" assignments and regular assignments. The work on "visiting judge" cases subsequent to the hearing is usually done at the ALJ's own hearing office.

V. (d)

(e) What is the average time taken by ALJ's to dispose of "visiting judge" cases?

Since we do not distinguish these types of cases from other cases in an ALJ's workload, no statistics of this kind are available.

V. (e)

(f) What arrangements, if any, are made to take care of, and monitor the progress of an ALJ's own cases while he/she is on a "visiting judge" assignment?

In every hearing office fully trained support staff handle the various aspects of case processing. Thus, all activity short of the ALJ's hearing and deciding the issues of a case can continue in the ALJ's absence.

V-f

(g) How are judges selected for "visiting judge" assignments?

ALJ's are selected from offices in which work levels are low in comparison to other areas. As far as practicable, assignments are made on a rotational basis. ALJ's often volunteer for these assignments.

V-g

VI. The Bellmon Review

In 1980 the Bellmon Amendment was enacted to require the review of certain decisions made by ALJ's. In an effort to understand the impact that this review procedure is having, we are requesting the following data:

(a) For 1981, 1982 and 1983, please give the number of ALJ's that have been reviewed under the Bellmon Amendment.

Since April 1982, all ALJ's have been subject to review as part of a national random sample of allowance decisions.

1981

66 individual selected ALJ's
41 new ALJ's

1982

135 individual selected ALJ's
136 new ALJ's

1983

137 individual selected ALJ's
99 new ALJ's

VI. (a)

(b) What is the standard or the criteria used for determining which ALJ's are to be reviewed and as to each ALJ, which decisions are to be reviewed?

(c) What percentage of cases of each ALJ's decisions are reviewed?

The following is a summary of the four types of review under the Bell…on Amendment. At present, approximately 15 percent of all allowance decisions are reviewed.

1. National Random Sample

Since April 1, 1982, a random sample of all title II and concurrent title II-title XVI disability allowance decisions have been selected by the component within SSA responsible for effectuating ALJ decisions (Office of Disability Operations (ODO)) prior to being effectuated for payment. The cases are sent to OHA and used as a means of providing feedback on the quality of decisions to all ALJ's. This review category comprises about 25 percent of the total cases reviewed.

2. New ALJ's

A 50 percent random sample of allowance decisions from all new ALJs is reviewed until it is determined that each ALJ's work is satisfactory.

3. Individually Selected ALJ's

SSA initially concentrated on reviewing favorable decisions of ALJ's with high allowance rates because the findings of the Bellmon study indicated a higher probability of error in the decisions of such ALJ's. In April 1982, we began to place less reliance on allowance rates by expanding the case selection criteria for own-motion review to include a national random sample, referrals from the SSA component responsible for effectuating ALJ decisions, and all decisions of newly hired ALJ's.

We no longer consider individual ALJ allowance rates in selecting ALJ cases for review. ALJ's are taken off or placed on review solely on the basis of the quality and accuracy of their allowance decisions as determined under own-motion review. At present, ALJ's under individual review are divided into categories-- those on 100 percent review, 75 percent review, 50 percent review and 25 percent review. Generally, as an ALJ's error rate under own motion review declines, the percentage of his or her cases reviewed also declines. If the ALJ's own motion review error rate stays consistently low, his or her cases will no longer be subject to own motion review. In doing the review, the individual ALJ's allowance rate is immaterial in evaluating the cases; the Appeals Council reviews the cases for accuracy only.

4. Office of Disability Operations Protest Cases

Disability examiners in ODO review a sample of all ALJ allowance decisions which are not otherwise reviewed prior to effectuation for payment. The only cases which we receive under this category are those in which ODO believes there is a statutory or regulatory impediment to effectuation. All ODO referred cases are reviewed.

(d) What action, if any, is taken pursuant to the completion of a review under the Bellmon Amendment?

If none of the regulatory criteria for review is met (as described in IV. (b)), the case is forwarded to the appropriate SSA component for processing the ALJ's decision.

If the Appeals Council decides to review the ALJ's decision it will either (1) issue a notice to the claimant giving the reason(s) for its action and what it is prepared to find absent new evidence or persuasive legal argument or (2) it will remand the case to an ALJ for further proceedings and a new decision.

In the first instance, after the claimant has had the opportunity to respond to the notice of own motion review and submit additional evidence, the Appeals Council will issue a decision affirming, modifying or reversing the decision of the ALJ (in a few cases the additional evidence submitted may result in the case being remanded). A copy of the Appeals Council's own-motion review notice and decision will go to the ALJ.

In cases where the Appeals Council decides to remand, the ALJ is instructed to obtain whatever additional evidence is considered necessary for proper resolution of the issues and/or to hold a hearing or a supplemental hearing. Upon completion of the record, the ALJ will issue a new decision which is subject to review either upon request of the claimant or on the Appeals Council's own motion.

VI. (d)

VII. Disciplinary Actions

We would like some information about disciplinary actions that have been taken by the agency against ALJ's. Please answer the following questions:

(a) How many ALJ's have been recommended for disciplinary actions in each of the past five years, and on what grounds were these recommendations made?

During the past 5 years, the Office of Hearings and Appeals has filed 13 complaints with the Merit Systems Protection Board (or its predecessor agency, the Civil Service Commission) for a decision as to whether there was good cause to discipline the respective ALJ's named in the complaints. The yearly breakdown and the basis for the complaints are as follows:

1978: ALJ No. 1 - inappropriate and abusive conduct toward another employee.

ALJ No. 2 - failure to increase productivity to a minimally acceptable level of efficiency.

ALJ No. 3 - intentional falsification of applications for employment for hearing examiner and ALJ positions.

1979: ALJ No. 4 - involuntary retirement based on disability.

1980: None.

1981: None.

1982: ALJ No. 5 - insubordination in refusing to accept and hear a docket of travel cases.

ALJ No. 6 - failure to maintain productivity at a minimally acceptable level of efficiency, and insubordination in failing to adhere to office procedure and operating instructions.

ALJ No. 7 - insubordination in cancelling scheduled hearings and refusing to set and hear additional cases.

ALJ No. 8 - failure to increase productivity to a minimally acceptable level of efficiency.

ALJ No. 9 - failure to increase productivity to a minimally acceptable level of efficiency.

ALJ No. 10 - failure to increase productivity to a minimally acceptable level of efficiency.

ALJ No. 11 - inappropriate and disruptive behavior directed against co-workers, and abuse of authority.

ALJ No. 12 - lewd and lascivious behavior directed toward female employees.

ALJ No. 13 - use of a Government owned vehicle for other than official purposes.

(b) How many ALJ's have been subject to disciplinary actions for each of the past five years?

See the response to VII (c).

(c) What type of disciplinary action was taken by the agency against each ALJ?

The status of the complaints filed against the various ALJ's is as follows:

ALJ No. 1 - the Merit Systems Protection Board (MSPB) found that there was good cause to impose a 30-day suspension against the ALJ. The suspension has been served.

ALJ No. 2 - The complaint was dismissed upon request of the parties after the employee pledged, pursuant to a stipulated agreement, that he would increase his number of monthly dispositions.

ALJ No. 3 - The MSPB found that there was good cause to impose a 60-day suspension against the ALJ. The suspension has been served.

ALJ No. 4 - The complaint was dismissed upon request of the parties after the employee voluntarily retired pursuant to a stipulated agreement.

ALJ No. 5 - After hearing, the MSPB's presiding ALJ found in a recommended decision that there was good cause to suspend the employee for 30 days. The matter is still pending final decision by the MSPB.

ALJ No. 6 - The MSPB has held a hearing and the record is closed. The matter is pending issuance of a recommended decision by the presiding ALJ.

ALJ No. 7 - The MSPB has held a hearing and the record is closed. The matter is pending issuance of a recommended decision by the presiding ALJ.

ALJ No. 8 - After hearing, the MSPB's presiding ALJ found in a recommended decision that there was good cause to remove the employee from his position as ALJ. The matter is still pending final decision by the MSPB.

ALJ No. 9 - The MSPB has held a hearing and the parties are preparing closing briefs. After the record is closed, the presiding ALJ will in due course issue a recommended decision.

ALJ No. 10 - The complaint was dismissed upon request of the parties after the employee voluntarily retired pursuant to a stipulated agreement.

ALJ No. 11 - After hearing, the MSPB's presiding ALJ found in a recommended decision that there was good cause to suspend the employee for 120 days. The matter is pending final decision by the MSPB.

ALJ No. 12 - After hearing, the MSPB's presiding ALJ found in a recommended decision that there was good cause to remove the employee. The matter is pending final decision by the MSPB.

ALJ No. 13 - The employee did not contest the charges and the MSPB's presiding ALJ found in a recommended decision that there was good cause to suspend the employee for 30 days. The matter is pending final decision by the MSPB.

(d) In how many disciplinary actions during the past five years has SSA sought dismissal; what was the basis for seeking dismissal, and how many ALJ's were actually terminated?

During the past 5 years, the agency filed eight complaints with the MSPB proposing the removal of named ALJ's for good cause. In four cases, the agency based its complaint on failure to increase productivity to a minimally acceptable level of efficiency. The remaining cases were based on the following grounds: involuntary retirement based on disability, failure to maintain productivity at a minimally acceptable level of efficiency and insubordination, inappropriate and disruptive behavior directed against co-workers and abuse of authority, and lewd and lascivious behavior directed against female employees. As of May 31, none of the ALJ's have been terminated.

VII (d)

(e) Please provide us with copies of all Federal District and Appellate Court cases in which the termination or disciplinary action of an ALJ was at issue. For those cases where settlements were made, please provide copies of the settlement agreements.

Attached are copies of Federal district and appellate court decisions in which disciplinary actions taken against ALJ's were at issue. The government did not settle any civil actions brought against it or its employees based on disciplinary actions imposed on ALJ's.

Attachments

VII. (e)

VIII. Agency and ALJ Interaction

We are interested in understanding how ALJ's interact with the agency and vica versa. Please provide us with a description of the method used to communicate with ALJ's in the field, the frequency and topics of such communications and the organizational structure of the Office of Hearings and Appeals.

Communication

Most written communication between the agency and ALJ's in the field is in the form of memoranda from the Chief ALJ (CALJ). The frequently released memoranda cover a variety of subjects such as:

- o personnel, staffing or facilities related matters
- o budgetary matters
- o suggestions for improved regional or hearing office operations
- o results of studies performed by central office components which analyze program or administrative areas
- o procedures for processing cases affected by court orders
- o responses to questions, complaints or suggestions received from ALJ's

Bi-weekly telephone conference calls are held between the CALJ and Deputy Chief ALJ's (DCALJ's) and the Regional Chief ALJ's (RCALJ's) in all 10 regions. Usually the 10 Regional Management Officer's (RMO's) are also included in these conference calls as are representatives of the Office of Field Administration and other central office components. The calls are designed to keep the RCALJ's informed on current issues and events and to discuss each region's general progress.

As funding permits, ALJ's In Charge (ALJIC) conferences are held at least once per year in each of the regions. These conferences are attended by the ALJIC's and sometimes the managers from each hearing office as well as the RCALJ and RMO and sometimes other regional office personnel. Central office representatives may include the Associate Commissioner (AC), the CALJ, DCALJ's and others. Topics of discussion vary from conference to conference but may include personnel matters, court cases, agency objectives and initiatives, hearing office operations, labor/management relations, space and equipment, etc.

Once or twice a year, OHA sponsors an RCALJ/RMO conference. These conferences are attended by the RCALJ and RMO's from all 10 regions as well as the AC, Deputy AC, CALJ, DCALJ's and central office representatives. The agenda generally revolves around discussions of the progress made toward reaching overall agency goals and objectives.

The OHA Handbook and the Administrative Directives System (ADS) are the operational guides and the Social Security Act, Regulations and Rulings are the programmatic guides for OHA. ALJ's are advised of the changes to the Handbook by Interim Circulars which are used until the changes are permanently incorporated. The ALJ's are also sent all proposed and final regulations changes and all Social Security Rulings on a regular basis.

Under the OHA Program Hotline system, ALJ's in the field can call a designated resource person in each regional office who can answer programmatic questions. To assure consistent application of program policy each resource person coordinates answers through the Office of Policy and Procedures in central office.

Organizational Structure of OHA

Copies of the OHA organization chart and functional statement are attached.

Attachments

VIII.

IX. Continuing Disability Investigations

We would like to be updated on the following statistics related to the continuing disability reviews. Please provide this information by years and provide percentage figures, where possible, in addition to numerical totals.

1. How many individuals have been reviewed since March 1981?

2. Of those reviewed, how many have received a final decision of termination; how many have been continued; and how many have died?

3. Of those reviewed please provide figures for the various levels of appeals--

   - o number initially terminated
   - o number seeking reconsideration
   - o number terminated after reconsideration
   - o number appealing to an ALJ
   - o number terminated by an ALJ
   - o number subject to review by Appeals Council
   - o number terminated by Appeals Council
   - o number remanded to an ALJ
   - o number terminated by an ALJ.

We are unable to supply the information in the form requested because we do not have longitudinal information on each CDI case as it moves through the various levels of appeals. The statistics in the attached table relate to workloads processed at the various levels for the periods requested but it must be kept in mind that, for example, the reconsideration requests processed in a fiscal year will include some cases where the CDI decision was made in the prior fiscal year as well as cases where the CDI decision was made in the same fiscal year. We have no information on the number of reviewed beneficiaries who died.

In addition, we do not have CDI data available separately for reconsideration cases prior to fiscal year 1982, for ALJ cases prior to February 1982, and for Appeals Council cases for any period. Some general data may be helpful for Appeals Council cases. From February 1982 through March 1983, the Appeals Council received 89,000 cases for review and affirmed the ALJ decisions in 88 percent of the cases reviewed, reversed in about 5 percent, and remanded in about 7 percent. A review of all Appeals Council dispositions for CDI cases during March 1983 produced rates similar to the overall rates for the February 1982 through March 1983 period. It must also be noted that an Appeals Council affirmance or reversal may be favorable or unfavorable to the claimant since the Council reviews both favorable (Bellmon own-motion review program) and unfavorable (claimant-initiated appeal) ALJ decisions.

Attachment

ALJ Dispositions and Reversal Rates for FY 1982
Region V

Name	Home Office	Dispositions		Reversal Rate	
		Total	Avg.	Decision	Disposition
		632	53	60.1%	55.5%
		567	47	68.7%	62.8%
		555	46	66.3%	60.7%
		546	46	43.1%	39.4%
		529	44	57.1%	49.9%
		528	44	55.1%	47.9%
		525	44	57.2%	51.6%
		769	43	28.0%	26.4%
		507	42	41.7%	38.9%
		502	42	42.5%	40.2%
		492	41	45.2%	42.3%
		492	41	43.8%	39.4%
		486	40	47.3%	44.0%
		473	39	56.6%	53.5%
		466	39	60.5%	53.0%
		464	39	60.6%	55.6%
		459	38	64.5%	56.6%
		458	38	46.7%	42.4%
		458	38	43.4%	38.0%
		456	38	69.1%	65.1%
		449	37	65.6%	59.0%
		448	37	58.9%	54.5%
		445	37	71.4%	61.1%
		444	37	68.4%	59.5%
		225	36	51.2%	46.9%
		225	36	61.5%	53.3%
		423	35	55.7%	49.6%
		421	35	47.9%	43.7%
		423	35	50.0%	43.9%
		418	35	66.9%	62.0%
		412	34	50.3%	45.4%
		411	34	43.0%	39.2%
		411	34	36.9%	33.3%
		410	34	40.5%	36.6%
		408	34	68.3%	64.5%
		408	34	64.1%	57.4%
		407	34	50.4%	45.0%
		405	34	73.5%	68.4%
		403	34	46.1%	39.7%
		402	34	73.9%	65.7%
		401	33	62.9%	57.1%
		400	33	67.9%	62.5%
		397	33	76.4%	70.3%
		397	33	68.3%	61.2%
		393	33	37.7%	33.7%
		391	33	58.4%	53.2%
		704	33	55.0%	47.1%

ALJ Dispositions and Reversal Rates for FY 1982
Region V (Con't.)

Name	Home Office	Dispositions		Reversal Rate	
		Total	Avg.	Decision	Disposition
		389	32	91.3%	65.9%
		389	32	65.4%	60.2%
		388	32	62.8%	53.9%
		388	32	58.3%	51.5%
		386	32	50.9%	46.4%
		385	32	59.3%	53.0%
		381	32	53.8%	48.8%
		380	32	22.7%	18.9%
		380	32	73.0%	68.4%
		378	32	44.2%	39.7%
		378	32	56.1%	49.7%
		376	31	58.7%	54.5%
		376	31	45.6%	40.4%
		376	31	57.2%	50.5%
		375	31	73.0%	66.4%
		372	31	58.1%	53.2%
		371	31	73.1%	68.7%
		370	31	58.0%	54.1%
		369	31	51.1%	44.7%
		369	31	63.5%	53.7%
		369	31	53.8%	47.4%
		368	31	67.0%	59.5%
		367	31	60.2%	55.6%
		36	31	69.7%	63.9%
		365	30	76.6%	70.1%
		364	30	69.9%	64.3%
		361	30	71.0%	67.0%
		360	30	67.4%	61.4%
		359	30	60.9%	55.2%
		358	30	60.1%	55.6%
		355	30	48.4%	43.4%
		354	30	52.3%	48.0%
		354	30	46.1%	41.5%
		190	30	24.5%	21.6%
		45	30	63.6%	46.7%
		353	29	55.2%	49.9%
		353	29	71.2%	66.6%
		351	29	64.0%	57.3%
		351	29	83.7%	74.6%
		350	29	49.4%	44.9%
		341	28	71.7%	61.6%
		340	28	40.2%	34.4%
		339	28	47.1%	43.7%
		338	28	66.8%	58.3%
		338	28	61.5%	54.4%
		336	28	40.0%	37.0%
		337	28	61.6%	56.7%

Region V (Con't.)

Name	Home Office	Dispositions		Reversal Rate	
		Total	Avg.	Decision	Disposition
		336	28	52.9%	43.5%
		336	28	71.6%	63.1%
		336	28	47.2%	40.2%
		334	28	66.1%	59.0%
		177	28	62.3%	54.2%
		176	28	45.6%	38.1%
		327	27	62.9%	58.1%
		321	27	58.6%	52.0%
		319	27	66.1%	56.0%
		32	27	48.5%	43.8%
		32	27	66.7%	50.0%
		318	26	65.6%	54.1%
		316	26	46.1%	41.1%
		312	26	38.0%	31.4%
		309	26	45.6%	39.5%
		308	26	49.8%	45.8%
		307	26	46.2%	41.0%
		30	26	69.6%	53.3%
		304	25	49.2%	42.1%
		296	25	71.9%	64.9%
		296	25	72.9%	65.5%
		159	25	71.4%	66.0%
		158	25	47.6%	43.0%
		29	25	69.2%	62.1%
		298	24	61.0%	54.8%
		290	24	86.1%	72.4%
		286	24	51.7%	43.7%
		284	24	40.1%	36.3%
		284	24	59.1%	52.8%
		84	24	53.3%	47.6%
		80	23	48.7%	46.3%
		80	23	67.1%	61.3%
		268	22	75.0%	66.0%
		256	21	71.3%	66.8%
		242	20	49.8%	44.6%
		128	20	46.2%	38.3%
		71	20	40.3%	38.0%
		24	20	61.9%	54.2%
		246	19	57.9%	54.9%
		63	18	76.7%	73.0%
		21	18	88.9%	76.2%
		71	18	46.7%	33.3%
		30	17	22.2%	20.0%
		159	16	74.0%	66.1%
		48	14	36.8%	29.2%
		17	14	53.3%	47.1%
		17	14	60.0%	57.9%

ALJ Dispositions and Reversal Rates for FY 1982
Region V (Con't.)

Name	Home Office	Dispositions		Reversal Rate	
		Total	Avg.	Decision	Disposition
			9	71.4%	50.0%
			8	76.9%	55.6%
			0	0.0%	0.0%
			0	0.0%	0.0%
			0	0.0%	0.0%
			0	0.0%	0.0%
			0	0.0%	0.0%
			0	0.0%	0.0%
			0	0.0%	0.0%
			0	0.0%	0.0%
			0	0.0%	0.0%
			0	0.0%	0.0%
			0	0.0%	0.0%
			0	0.0%	0.0%
			0	0.0%	0.0%
			0	0.0%	0.0%

APR 4 1983

Associate Commissioner
Office of Hearings and Appeals

March Results

All Administrative Law Judges
All Hearing Office Staff

I want to thank all of you for what you accomplished during the month of March. The preliminary results indicate a national average disposition rate of 40 per Administrative Law Judge for the month. These results demonstrate that the professionalism and dedication of our Administrative Law Judge corps, backed up by a strong and committed support staff, are unmatched in government service. It is particularly noteworthy that we were able to provide this level of service to the claimants in spite of the distractions and special frustrations we have experienced over the past several months. I am proud to be associated with you.

For your information, I am providing the Regional average disposition rates for March:

Region I	- Boston	34
Region II	- New York	41
Region III	- Philadelphia	36
Region IV	- Atlanta	46
Region V	- Chicago	35
Region VI	- Dallas	39
Region VII	- Kansas City	45
Region VIII	- Denver	40
Region IX	- San Francisco	40
Region X	- Seattle	27

/s/ Louis B. Hays

Louis B. Hays

cc: RCALJs

LBHays:asg:RGA;4/4/83:235-8333

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SGR1

JAN 17 1983
Director, Office of Appraisal

Follow-up Review of Selected Low Allowance Rate ALJ Decisions -- INFORMATION
~~(ES-7-20-204)~~

Mr. Louis B. Hays
Associate Commissioner
Office of Hearings and Appeals
Through: ES____

Subsequent to our "Report on Study of Unappealed Affirmations Issued by Low Allowance Rate ALJs," submitted on July 20, 1982, we were asked to proceed with a special review of the ALJs with the lowest allowance rates.

This current study has focused on five selected ALJs. As in the initial project, the purpose was to further study the overall quality and accuracy of unappealed affirmation (denial) decisions in disability claims issued by low allowance rate ALJs. The five ALJs were selected from the Computer Production Report (118R) for the period March 1, 1982 through August 31, 1982. Each of the ALJs had average monthly production of at least 29 dispositions and an allowance rate of less than 25 percent. We intended to review five decisions from each ALJ, and cases were requested accordingly. Due to variances in the number of requests for Appeals Council review of hearing decisions, however, we were unable to attain this number. Nevertheless, we received a representation of cases for each ALJ.

Similar to the initial study, decisions were examined for (1) general compliance with content and format standards and (2) resolution of substantive items to include evaluation of evidence, application of sequential evaluation, residual functional capacity (RFC) assessment, correctness of decision, and accuracy of the regulatory basis cited for decision. Also, the reviewing program (OA) analyst recorded the action that would have been recommended to the Appeals Council had the case been appealed. For reference, copies of the July 20 report (Tab A) and the special data collection form (Tab B) are attached.

The chart below lists our findings. ALJs appear in alphabetical order by last name and code number only.

This sampling shows that the five ALJs have no significant problems complying with basic standards of decisional content and format. Although the number of cases reviewed does not provide a sufficient data base on which to draw firm conclusions, it appears that there may be significant deficiencies in the adjudication practices of ALJs [redacted] and [redacted]. Proportionately, they had very high incidences of inadequate rationale, not applying the sequential evaluation procedure in the rationale and/or findings, and incorrect or incomplete RFC assessments. We believe that such defects in adjudicative techniques impact on the correctness (or incorrectness) of their conclusions on the question of disability. It is noted, however, that ALJs [redacted] and [redacted] are in Region VI, and that ALJ refresher training was not conducted in that region until November 1982. All decisions reviewed for this study were issued in October.

Generally, we believe that the appeals system itself provides adequate safeguards for the majority of claimants who have been incorrectly denied entitlement. Nevertheless, OHA has a legitimate concern for the quality of hearing decisions, whether they be allowances or denials. It appears that ALJs [redacted] and [redacted] are productive, veteran ALJs, and any contacts with them on the quality of their work should be carefully approached. OCALJ may wish to consider some type of communication with them after consultation with the OAO branches having long term familiarity with the decisions of ALJs [redacted] and [redacted]

On the basis of the findings of our two studies, we believe that further review by OA of low allowance rate ALJs is not warranted at this time.

Levi J. Ogden

Attachments

Tab A - Report dated 7/20/82
Tab B - Data Collection Form

ALJ:	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	Total
Average Monthly Production	34	29	29	44	31	
Cumulative Allowance Rate	24%	23%	20%	23%	20%	
Number of Cases Reviewed	4	2	6	6	5	22
*Content/Format Defects	4	0	0	1	2	6
Inadequate Evaluation/ Rationale	1	0	4	5	1	11
Sequential Evaluation Noncompliance	1	0	3	5	1	9
RFC Assessment Incorrect or Incomplete	0	1	5	4	0	10
Conclusion not Based on Substantial Evidence	1	0	3	2	1	7
Specific Basis for Decision Not or Incorrectly Cited	2	0	1	1	0	3
Would have Recommended Reversal	0	0	2	1	**1	4
Would have Recommended Remand for Evidentiary Development	1	0	1	1	0	3

*Encompasses seven separate items per decision (see page one of data collection form, Tab B).

**Recommendation for reversal would have been contingent on MSS confirmation of impairments meeting or equalling listings and opinion on date of onset.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to: SGR1

Memorandum

Date: JUL 20 1982

From: Director, Office of
Appraisal

Subject: Report on Study of Unappealed Affirmations Issued by Low Allowance Rate
ALJs -- DECISION

To: Mr. Louis B. Hays
Associate Commissioner
Office of Hearings and Appeals
Through: ES ____

ISSUE

To study the overall quality and accuracy of unappealed affirmation (denial) decisions in disability claims issued by low allowance rate administrative law judges on a national basis.

BACKGROUND

With the focus of the ongoing Bellmon Review directed toward an examination of the quality and accuracy of allowance decisions issued by high allowance rate ALJs, interest was generated in the products of ALJs at the other end of the adjudication spectrum. It was believed that a balanced and equitable quality control system demanded at least an informal sample study of affirmations issued by low allowance rate ALJs.

FACTS

Low allowance rate ALJs were identified from an inspection of the Computer Production Report (118R) for the period June 1, 1981 through November 30, 1981. ALJs with a cumulative allowance of 35 percent or less were selected for the study. Nationally, 36 ALJs registered allowance rates of 35 percent or less for that period. In turn, a listing of cases handled by these ALJs was obtained from the special report on ALJ dispositions available through the interactive terminal. From this report, three unfavorable affirmation disability issue cases (Title II, Title XVI, or concurrent) were randomly selected from each ALJ's dispositions for the month of December 1981. Office of Appraisal requested the selected cases from Docket and Files. Subsequent to the initial request, a supplemental request for cases was made from the special report on ALJ dispositions for April 1982. Upon receipt, case files were reviewed for the purpose of this study by OA program analysts. A total [illegible] 94 cases were examined.

RECEIVED
1982 JUL 20 PM 3 25

A special data collection form had been designed for this study. The form provided a check list for general compliance with decisional content and format standards. Most important, the form specifically evaluated substantive areas of adjudication that included the ALJ's rationale, compliance with the sequential evaluation procedure, residual functional capacity (RFC) assessment, substantial evidence to support conclusion, application of specific regulatory standard as basis for decision, and other major aspects such as completeness of evidentiary (medical or vocational) development (See Attachment).

DISCUSSION

I. General

First, we wish to caution that this study should not be construed to imply that an allowance rate of 35 percent, or any particular percent, is "too low." ALJs with allowance rates of 35 percent or less were arbitrarily selected since they appeared to represent, on a comparative basis, a relatively small number of ALJs at the lowest end of the allowance scale. OA is not in a position to determine the high/low range of "acceptable" cumulative allowance rates. We recognize that an ALJ's reversal rate can appropriately fluctuate from month to month, and from time frame to time frame. We believe, however, that a record of consistent and prolonged allowance rates substantially above or below the national average may be a basis for implementing quality review measures.

Unappealed disability affirmation (denial) cases from all but one of the 36 ALJs were received and reviewed. Average monthly production of the 35 ALJs reviewed was 28 dispositions, with the highest individual recording 65; the lowest had nine. Twenty-three ALJs had allowance rates between 30-35 percent, 10 ALJs ranged between 25-29 percent, and only two showed 24 percent or less (23 and 13 percent). Low allowance ALJs in this study are represented in every region except Regions III and VII. Most low allowance rates were from Region IV (12 ALJs) and Region VI (7 ALJs), accounting for 34 percent and 20 percent, respectively.

II. Format and Content

Generally, the decisions reviewed were sufficiently complete with respect to prescribed format and content items as follows:

	Adequate	Inadequate
Opening Statement	94 (100%)	0 (0%)
Statement of Issues	92 (98%)	2 (2%)
Statement of Applicable Law and Regulations	88 (94%)	6 (6%)
Statement of Evidence Considered	90 (96%)	4 (4%)
Evaluation of Evidence	90 (96%)	4 (4%)
Specific Findings	90 (96%)	4 (4%)
Concluding ("Decisional") Paragraph	94 (100%)	0 (0%)

III. Substantive Appraisal Categories

The ALJs' application of adjudicative procedures and standards crucial to accurate disability evaluation and to correct decision-making was assessed as follows:

1. Did the evaluation of evidence section provide a comprehensive rationale in support of ALJ's conclusion? This question penetrates beyond the point where an evaluation is merely adequate. The criteria considered was whether the evaluation contained a clear and detailed explanation of the reasons, based on the facts of the case, that led to the ALJ's findings and conclusions; whether the comparative value and significance of evidence was correctly appraised, and if any conflicting information or statements in the evidence were resolved.

Comprehensive Rationale

Yes	No
78 (83%)	16 (17%)

2. Was sequential evaluation procedure appropriately followed? The procedure for step by step evaluation of disability set forth in 20 CFR 404.1520 and 416.920 was applicable to virtually all disability claims included in this study, except for two disabled widows' cases. A frequent evaluative defect occurs when the Table Rules of Appendix 2, Regulations Nos. 4 or 16, are applied without going through the earlier requisite steps. Some ALJs will cite or explain the sequential procedure under the statement of law and regulations, but do not actually apply it in the evaluation and/or findings.

Sequential Evaluation Procedure Appropriately Followed

Yes	No	N/A
69 (75%)	23 (25%)	2 (Not counted in percentage)

3. Was ALJ's RFC assessment complete, correct, and supported by medical evidence? Here the ALJ's determination of claimant's residual functional capacity was measured against the medical findings, diagnoses and assessments, and the credible testimony as reflected in the decision. Also considered was whether the ALJ properly determined RFC in terms of mental/emotional functional limitations when evaluating cases involving mental or combination mental and physical impairments. Other non-exertional restrictions were taken into account when appropriate. In cases where the ALJ denied on the basis of "no severe impairment," it was assumed that the ALJ's RFC finding was that, "claimant did not have any significant limitations of his/her physical or mental ability to do basic work activities."

RFC Assessment Correct

Yes	No	N/A
56 (61%)	36 (39%)	2 (DWB claims not counted in percentage)

4. Was ALJ's conclusion based on substantial evidence? This is the most fundamental question concerning the correctness of a decision. Support for an ALJ's conclusion must be founded on valid, credible and convincing evidence, although not necessarily on a preponderance of evidence. Decisions deemed not to be based on substantial evidence were, in many cases, not wrong per se, but lacked conclusive evidence in the record on which to sustain the denial, if challenged.

Conclusion Based on Substantial Evidence

Yes	No
71 (75.5%)	23 (24.5%)

5. Did ALJ cite the correct specific regulatory standard on which he/she based the conclusion? This important factor was measured in terms of consistency with the ALJ's findings. If the specific standard cited by the ALJ (e.g., claimant engaging in substantial gainful activity, no severe impairment, claimant can perform past relevant work, or "not disabled" under the criteria of the Medical-Vocational Table Rules) was consistent with his/her evaluation and findings, the correct regulatory standard was cited. Therefore, in some cases the "correct" standard was stated in the decision even though the reviewing analyst may have disagreed with the ALJ's findings or conclusions.

Correct Regulatory Standard
Cited on Which ALJ Based Conclusion

Yes	No
79 (84%)	15 (16%)

6. Were there any major problems (or errors) in decision or in the hearing process not reflected in any other evaluation category? The purpose of this item was to reflect deficiencies in evidentiary development, in securing expert medical or vocational testimony when needed, or in other adjudicative procedures. All 23 decisions considered not based on substantial evidence were included in this category as "problem" cases. Also included as "other problems" were cases where development preferably should have been more complete but evidence of record was nevertheless sufficient to support the denial and decisions that failed to resolve some ancillary issue.

Yes (Other problems)	No (No other problems)
38 (40%)	56 (60%)

CONCLUSION

On the whole, this sample study has shown that the low allowance rate ALJs, in most instances, prepare decisions that generally conform in content and format to OHA standards. Quality assessment of key evaluative/adjudicative factors is on the positive side. Eighty-three percent of the decisions had an evaluation of the evidence containing a detailed and explicit rationale in support of findings and conclusions. The sequential evaluation procedure was correctly applied and discussed in 75 percent of the decisions. Although the procedure was, in effect, utilized in a good many of the remaining 25 percent, the step-by-step evaluation as relevant to the individual case was not reflected in the written decisions.

Residual functional capacity assessments were inaccurate or incomplete in a sizeable 39 percent. This defect is not always fatal because misjudgments of RFC exertional levels do not necessarily mean that a denial of disability was wrong. For example, under the Vocational Rules or other criteria, a given claimant, depending on the applicable medical-vocational factors, may be "not disabled" regardless of whether his/her exertional capacity remains at the medium, light, or even at the sedentary level. RFC evaluation defects mostly occured where the record lacked definitive medical assessment, or where functional limitations imposed by significant mental or other non-exertional impairments were not documented.

Conclusions of "not disabled" were supported by substantial evidence in 75.5 percent of the decisions studied. Of the 23 (24.5 percent) that were not supported, the reviewing analyst would have recommended reversal on the record in only four (or 4.3 percent) of the total cases studied. In one of these a closed period of disability would have been recommended to the Appeals Council.

Granting review in order to remand for the purpose of securing additional development would have been recommended in the other 19 (20.2 percent) of these cases. Nine out of the 19 were considered to be in need of psychiatric and/or psychological development, and two cases were believed to require medical advisor input.

In 84 percent of the decisions the ALJs correctly stated the specific regulatory standard for denial of disability in terms of their evaluations and findings. We believe this to be a strong showing.

"Other" major problems that occurred in some cases constituted defects on the order of incomplete development (often in the psychiatric field), though not so serious as to warrant an AC review recommendation, failure to recognize and resolve an ancillary issue such as performance of substantial gainful activity or late filing of a request for hearing, or other oversights or unconventional techniques.

Additional points of interest are that four ALJs had two decisions each that were considered by the reviewing analysts to lack support of substantial evidence; and there were four decisions that were based on substantial evidence but nevertheless believed to be very "close" calls, meaning that another "reasonable mind" might have interpreted the facts in those cases as meriting an allowance.

In our opinion, the sampling of cases in this limited study was too small to permit a formulation of hard conclusions. The results, however, suggest that on the whole, the quality of decisions issued by this relatively small group of ALJs is good. Although the group studied is comparatively "conservative" in adjudicative appproach, we believe that the theoretical grant review recommendation rate of 24.5 percent is not disturbingly high; particularly when considering that only 4.3 percent of the decisions overall would have been recommended for reversal on the record.

RECOMMENDATIONS

Further informal review may be appropriate with respect to denial decisions issued by an ALJ who had a 13 percent reversal rate as well as two decisions (in this study) considered lacking in substantial evidence.

Our findings seem to indicate some inconsistency in evaluating mental/emotional impairments. We recommend that consideration be given to offering supplemental guidance or orientation to ALJs in the area of evaluating severity and assessing functional and work related limitations in mentally and emotionally impaired claimants.

DECISION

1. OA shall undertake further informal sample review of unappealed denial decisions issued by the ALJ having the lowest allowance rate (13 percent) to ascertain whether peer counselling on adjudicative procedures and techniques should be recommended. ✓

   APPROVE________________
   DISAPPROVE______________
   OTHER__________________
   DATE___________________

2. OCALJ shall direct the planning and implementation of a refresher training or an information program providing guidance to ALJs on the evaluation of severity and the assessment of functional capacity and work related limitations in mental/emotional impairments.

   APPROVE________________
   DISAPPROVE______________
   OTHER__________________
   DATE___________________

Levi J. Ogden

Attachment

UNAPPEALED AFFIRMATION STUDY
DECISION EVALUATION FORM (OA)

______________________ ALJ's Name	______________________ HO Code
______________________ ALJ's Code	______________________ Region No.
______________________ HO Name	______________________ Claimant's Name
	______________________ SSN

I. DECISION CONTAINS ADEQUATE:

1. Opening statement?	______ Yes	______ No
2. Statement of issues?	______ Yes	______ No
3. Statement of applicable law and regulations?	______ Yes	______ No
4. Statement of evidence considered?	______ Yes	______ No
5. Evaluation of evidence?	______ Yes	______ No
6. Specific findings?	______ Yes	______ No
7. Concluding ("decisional") paragraph?	______ Yes	______ No

8. Give brief explanation for any "No" answer(s) to items 1 through 7 above -- ______________________________

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II. SUBSTANTIVE APPRAISAL:

1. Did the evaluation of evidence section provide a comprehensive rationale in support of ALJ's conclusion?

____ Yes ____ *No

*If "No," give brief explanation -- ______________________________

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2. Was sequential evaluation procedure appropriately followed?

____ Yes ____ *No ____ N/A

*If "No," give brief explanation -- ______________________________

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3. Was ALJ's RFC assessment complete, correct, and supported by medical findings?

____ Yes ____ *No ____ N/A

*If "No," give explanation -- ______________________________

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4. Was ALJ's conclusion based on substantial evidence?

_____ Yes   _____ *No

*If "No," give explanation -- ______________________________

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5. Did ALJ cite the correct specific regulatory standard on which he/she based conclusion?

_____ Yes   _____ *No   _____ *None Given

*If "No" or "None given," show specific standard that should have been applied --

____

____

____

6. Were there any major problems (or errors) in decision or in the hearing process not reflected in any of the above items (parts I and II), such as insufficient medical or vocational development?

_____ *Yes   _____ No

*If "Yes," give explanation -- ______________________________

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______________________________ Reviewer

______________________________ Date

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SGR1

NOV 1 2 1982

Director, Office of
Appraisal

Report on Special Case Study to Examine ALJ Compliance with Current CDI Policy — INFORMATION

Mr. Louis B. Hays
Associate Commissioner
Office of Hearings and Appeals
Through: ES _____

On the basis of data secured from our automated system, we submitted reports in July and September estimating ALJ compliance with current policy in adjudicating continuing disability cases. Our data collection system is not specifically geared to obtain information that would accurately reflect CDI compliance; however, with available data, we estimated a compliance rate in excess of 81 percent in our September report. Due to the imprecise nature of this estimate, we undertook a sample case study to examine the specific bases being applied by ALJs in continuing disability allowances.

In general, the policy set forth under 20 CFR 404.1590(a) provides that the disability requirements will not continue to be met where the medical or other evidence shows that a person is not disabled or if there is not enough evidence to support a finding that disability continues. More specifically, current policy calls for adjudication of continuing disability issues essentially on the same standards applied to initial disability claims. In particular, OHA has been concerned with ending the former somewhat prevalent practice of deciding continuing disability on the basis of "no medical improvement" (for allowances) or on the basis of "medical improvement" (for denials).

One hundred and fifty-two Bellmon review CDI cases were randomly selected for this study. Below is a breakdown of the various bases identified for ALJ allowances. As a point of interest, because of its importance to accurate disability evaluation, the decisions examined in this study were checked for application of the sequential evaluation procedure. No attempt was made to review any other aspect of these decisions.

Basis for Finding Disability Continues	Number	Percent
Impairment meets or equals Listings	42	27.6%
Claimant's RFC is less than full range of sedentary work activity	27	17.8%
Vocational Rule applies	26	17.1%
Severe mental impairment prevents SGA	18	11.8%
Combination mental/physical impairments prevent SGA	15	9.9%
Severe physical impairments prevent SGA	12	7.9%
No medical improvement	5	3.3%
Other nonspecific bases	5	3.3%
Framework of Rules	2	1.3%
Totals	152	100%

Sequential Evaluation Followed	Number	Percent
Fully	89	58.6%
Partially	33	21.7%
Not at all	30	19.7%
Totals	152	100%

We believe that the findings from this sampling show that there is widespread compliance with the current CDI policy, as had been suggested by our previous statistical studies. With only 3.3 percent of the decisions based on "no medical improvement," we believe compliance is not a significant problem.

It is our impression that, for the most part, ALJs are adjudicating continuing disability on the same standards applied to initial disability claims. ALJs fully followed the sequential evaluation in the majority of decisions (58.6 percent), and partially applied the procedure in another 21.7 percent, for a total of 80.3 percent where sequential evaluation was utilized.

Levi J. Ogden

DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to: 8GR1

Memorandum

Date: OCT 4 1982

From: Associate Commissioner
Office of Hearings and Appeals

Subject: Implementation of the Feedback Process in OHA's Ongoing Bellmon Review - - INFORMATION

To: Regional Chief Administrative Law Judges

The purpose of this memorandum is to provide you with an overview of the Bellmon review as it is now functioning and to advise you of your role in providing feedback to the administrative law judges (ALJs) under review. This is a follow-up to our discussion on this subject at the RCALJ/RMO Conference in Washington on June 16 and 17.

The ongoing review of hearing decisions under the Bellmon Amendment is intended to promote greater consistency and accuracy among the ALJs by identifying and correcting those decisions that do not comply with the applicable provisions of the law, regulations and Rulings. Under the Bellmon review program, the Appeals Council, on its own motion, formally reviews ALJ decisions that do not appear to be correct and, where the decision is incorrect, either reverses the ALJ's decision or remands the case to the ALJ for further proceedings. This program results from Congressional concerns about the high overall percentage of cases allowed at the hearing level, the wide variance in allowance rates among individual ALJs, the fact that only ALJ decisions denying benefits were generally subject to further review, and the inconsistencies noted in decision-making at the different adjudicatory levels.

The initial phase of the pre-effectuation ongoing review program, which started October 1, 1981, was limited to approximately seven and one-half percent of all Title II and Title II/XVI concurrent disability allowance decisions issued by a group of hearing offices (HOs) and individual ALJs selected on the basis of allowance rates of 70 percent or higher, and 74 percent or higher, respectively. Allowance rates were used as the basis for selecting the initial review group, both because of Congressional intent and because studies had shown that decisions in this group would be the most likely to contain errors which would otherwise go uncorrected. Rather than reviewing all disability allowance decisions produced by these HOs/ALJs, a decision was made to review half of the group's allowance decisions in order to increase the total number of ALJs under review and thereby enhance the overall effectiveness of the review. The initial selection procedure was designed to yield a group of hearing decisions for review which were likely to be among the most error prone and thus to make the most efficient use of resources while correcting the greatest number of faulty hearing decisions.

On April 1, the Bellmon review was enlarged to include 15 percent of ALJ disability allowance decisions, and the case selection criteria for the Bellmon program were redesigned and expanded. Under this expansion, the group of ALJs selected on the basis of high allowance rates is just one of several components of the review. A national random sample of ALJ allowances, without regard to any ALJ's allowance rate, now accounts for 25 percent of the total reviewed cases. The expanded Bellmon review also includes cases identified and referred to the Appeals Council by the Office of Disability Operations (ODO). In addition, a review of decisions from new ALJs is included in the program. One other change has been to remove entire hearing offices from the review.

The following is a summary of the four aspects of the Bellmon review:

- Random Sample - A national random sample of allowance decisions accounts for 25 percent of the Bellmon cases. These cases are randomly selected and sent to OHA from ODO prior to effectuation. Data from this part of the Bellmon review is especially important as a baseline for comparison with information from the review of individual ALJs. It is also an important means of providing feedback on the quality of decisions to all ALJs and will aid in identifying areas where policy clarification or training is needed.

- New ALJs - The decisions from new ALJs are reviewed until it is determined that each ALJ's work is satisfactory. The review of new ALJs is useful in determining the effectiveness of the ALJ training program, and it enables us to take remedial action, if necessary, at the most opportune stage in an ALJ's development.

- ODO Protests - Disability examiners in ODO are reviewing a sample of ALJ allowances prior to effectuation as part of a pilot project. If a disability examiner believes there is a substantive disability issue in the case which does not comport with the law and regulations, the claim file is referred to OHA and made part of the Bellmon review. The Appeals Council follows standard procedures in deciding whether or not to take own motion.

- Individual ALJs - During the initial phase of the ongoing review, data was collected on own motion rates (the frequency that the Appeals Council takes action to correct an ALJ decision). Based on these data, ALJs are divided into four groups — those on 100 percent review, 75 percent review, 50 percent review and 25 percent review. Generally, as ALJs' own motion rates decline, their level of review also decreases. Continuing modifications are made in the group of ALJs under review and the level of review for individual ALJs. One hundred-six ALJs are included in this portion of the Bellmon review.

Although the allowance rate is the basis for selection of individual ALJs for that portion of the review, this factor receives no consideration in determining whether to remove ALJs from review. Decisional accuracy is the sole criterion, which we have defined as a five percent own motion rate for three consecutive months.

Through September 1, as we reported to you on September 16, we have reviewed 10,560 allowance decisions. The own motion rate for all of these cases is 12.1 percent. However, the rates vary significantly depending on the category of the review. The highest own motion rate, 50.7 percent, exists in the ODO protests. The next highest category is the group of individual ALJs, 14.2 percent. These rates are contrasted by the rates for the new ALJs, 7.8 percent and the random sample, 5.7 percent.

While the figures cited above are based on the cases where the Appeals Council has completed its action, there are a substantial number of cases pending where the Appeals Council's support staff has recommended that the Council take corrective action and such action has not yet been taken. Since our experience has shown that about 95 percent of these recommendations ultimately result in either reversals or remands at the AC level, it is noteworthy that the overall "recommended" own motion rate is approximately six and one-half percent higher than the actual own motion rate.

In addition to own motion rates, we also maintain information regarding the overall percentage of defective cases. A case is considered defective if the decision contains some type of deficiency — improper basis for disability conclusion, failure to follow sequential evaluation, improper questioning of an expert witness, etc. — yet reaches an ultimately correct conclusion that the claimant is disabled. Through September 1, the overall defect rate was 47.8 percent, with the various category percentages as follows: ODO protests - 91.0 percent; random sample - 52.7 percent; individual ALJs - 49.7 percent; and new ALJs - 30.8 percent. Although the majority of these decisions did not contain deficiencies so severe that an own motion action was recommended, the Social Security Regulations are not being correctly applied in many instances.

One essential requirement to ensure the success of the Bellmon review program is to establish a system for providing feedback to the ALJs who are under review so that they will know where their decisions are faulty and can take steps to overcome their decisional weaknesses. I have therefore authorized the establishment of a feedback system to function alongside the case review process. The purpose of this system is to relay Bellmon review information back to the ALJs to improve their individual adjudicative performance.

Under the first stage of the feedback system the CALJ will send a memorandum to you enclosing a brief outline of the particular problems found in the decisions of that ALJ. Also enclosed will be summaries of several cases reviewed by the Appeals Council on its own motion with supporting documentation. You will be asked, together with Deputy Chief Administrative Law Judge Irwin Friedenberg on occasion, to meet with the ALJ involved to discuss the problems reported and review steps that can be taken to improve the accuracy of his/her decisions. You will also be asked to advise the Chief Administrative Law Judge of the dates and results of the meetings.

I cannot stress enough the importance of these counselling sessions. They represent the principal means for constructive contacts with the ALJs on this subject, and are the point at which decisional problems can be addressed at a truly individual level.

Thereafter, a further review of the ALJ's decisions will be undertaken for three months to determine if there has been improvement. If no change has occurred the CALJ may either request additional counselling through you or authorize special training in the region or in Central Office. If there is still no measurable improvement other steps will be considered.

Initially, because of staffing limitations, feedback will be limited to the 16 ALJs in the 100 percent review group. As the system progresses, all ALJs in the individual group will be included in this process. In the meantime, I will be sending you under separate cover some sample computer-generated reports for ALJs not included in the initial feedback group. While they cannot be expected to have the same impact as more individualized feedback, these reports could provide a means for getting some specific case information out to the field as it is generated by the review.

The price of achieving our goal of improved decisional quality should not be alienation of the ALJ corps. In this connection your approach to the feedback counselling sessions will be critical and must be wholly constructive. Anything else will render the effort futile and self-defeating. A professional, positive and constructive manner must be maintained throughout the course of those sessions if we are to succeed.

You will soon be receiving feedback memoranda on the first group of ALJs. I appreciate your cooperation in the feedback process and look forward to your early notification to CALJ Brown of the results of your sessions.

Louis B. Hays

DEPARTMENT OF HEALTH & HUMAN SERVICES

Chron Copy
10

Refer to: SGR1

Memorandum

Date: SEP 24 1982

From: Associate Commissioner
Office of Hearings and Appeals

Subject: Description of the Bellmon Own-Motion Review Program — INFORMATION

To: All Administrative Law Judges

The purpose of this memorandum is to provide you with an overview of the Bellmon review as it is now functioning and the results of the review.

The ongoing review of hearing decisions under the Bellmon Amendment is intended to promote greater consistency and accuracy by identifying and correcting those decisions that do not comply with the applicable provisions of the law, regulations and Rulings. Under the Bellmon review program, the Appeals Council, on its own motion, formally reviews ALJ decisions that do not appear to be correct and, where the decision is incorrect, either reverses the ALJ's decision or remands the case to the ALJ for further proceedings. (For a more complete description of the procedures used by the Appeals Council, see Social Security Ruling 82-13 published in the January 1982 compilation of the Rulings.) This program results from Congressional concerns about the high overall percentage of cases allowed at the hearing level, the wide variance in allowance rates among individual ALJs, the fact that only ALJ decisions denying benefits were generally subject to further review, and the inconsistencies noted in decision-making at the different adjudicatory levels.

The initial phase of the pre-effectuation ongoing review program, which started October 1, 1981, was limited to approximately seven and one-half percent of all Title II and Title II/XVI concurrent disability allowance decisions issued by a group of hearing offices (HOs) and individual ALJs selected on the basis of allowance rates of 70 percent or higher, and 74 percent or higher, respectively. Allowance rates were used as the basis for selecting the initial review group, both because of Congressional intent and because studies had shown that decisions in this group would be the most likely to contain errors which would otherwise go uncorrected. Rather than reviewing all disability allowance decisions produced by these HOs/ALJs, a decision was made to review half of the group's allowance decisions in order to increase the total number of ALJs under review and thereby enhance the overall effectiveness of the review. The initial selection procedure was designed to yield a group of hearing decisions for review which were likely to be among the most error prone and thus to make the most efficient use of resources while correcting the greatest number of faulty hearing decisions.

On April 1, the Bellmon review was enlarged to include 15 percent of ALJ disability allowance decisions, and the case selection criteria for the Bellmon program were redesigned and expanded. Under this expansion, the group of ALJs selected on the basis of high allowance rates is just one of several components of the review. A national random sample of ALJ allowances, without regard to any ALJ's allowance rate, now accounts for 25 percent of the total reviewed cases. The expanded Bellmon review also includes cases identified and referred to the Appeals Council by the Office of Disability Operations (ODO). In addition, a review of decisions from new ALJs is included in the program. One other change has been to remove entire hearing offices from the review.

The following is a summary of the four aspects of the Bellmon review:

- Random Sample - A national random sample of allowance decisions accounts for 25 percent of the Bellmon cases. These cases are randomly selected and sent to OHA from ODO prior to effectuation. Data from this part of the Bellmon review is especially important as a baseline for comparison with information from the review of individual ALJs. It is also an important means of providing feedback on the quality of decisions to all ALJs and will aid in identifying areas where policy clarification or training is needed.

- New ALJs - The decisions from new ALJs are reviewed until it is determined that each ALJ's work is satisfactory. The review of new ALJs is useful in determining the effectiveness of the ALJ training program, and it enables us to take remedial action, if necessary, at the most opportune stage in an ALJ's development.

- ODO Protests - Disability examiners in ODO are reviewing a sample of ALJ allowances prior to effectuation as part of a pilot project. If a disability examiner believes there is a substantive disability issue in the case which does not comport with the law and regulations, the claim file is referred to OHA and made part of the Bellmon review. The Appeals Council follows standard procedures in deciding whether or not to take own motion.

- Individual ALJs - During the initial phase of the ongoing review, data were collected on own motion rates (the frequency that the Appeals Council takes action to correct an ALJ decision). Based on these data, ALJs are divided into four groups — those on 100 percent review, 75 percent review, 50 percent review and 25 percent review. Generally, as ALJs' own motion rates decline, their level of review also decreases. Continuing modifications are made in the group of ALJs under review and the level of review for individual ALJs. One hundred-six ALJs are included in this portion of the Bellmon review.

Although the allowance rate is the basis for selection of individual ALJs for that portion of the review, this factor receives no consideration in determining whether to remove ALJs from review. Decisional accuracy is the sole criterion, which we have defined as a five percent own motion rate for three consecutive months. In other words, an ALJ with an extremely high allowance rate could be removed from the Bellmon review if his or her decisions are correct.

Through September 1, we have reviewed 10,560 allowance decisions. The own motion rate for all of these cases is 12.1 percent. However, the rates vary significantly depending on the category of the review. The highest own motion rate, 50.7 percent, exists in the ODO protests. The next highest category is the group of individual ALJs, 14.2 percent. These rates are contrasted by the rates for the new ALJs, 7.5 percent and the random sample, 5.7 percent.

While the figures cited above are based on the cases where the Appeals Council has completed its action, there are a substantial number of cases pending where the Appeals Council's support staff has recommended that the Council take corrective action and such action has not yet been taken. Since our experience has shown that about 95 percent of these recommendations ultimately result in either reversals or remands at the AC level, it is noteworthy that the overall "recommended" own motion rate is approximately six and one-half percent higher than the actual own motion rate.

In addition to own motion rates, we also maintain information regarding the overall percentage of defective cases. A case is considered defective if the decision contains some type of deficiency — improper basis for disability conclusion, failure to follow sequential evaluation, improper questioning of an expert witness, etc. — yet reaches an ultimately correct conclusion that the claimant is disabled. Through September 1, the overall defect rate was 47.6 percent, with the various category percentages as follows: ODO protests - 91.0 percent; random sample - 52.7 percent; individual ALJs - 49.7 percent; and new ALJs - 30.5 percent. Although the majority of these decisions did not contain deficiencies so severe that an own motion action was recommended, the Social Security Regulations are not being correctly applied in many instances.

An essential requirement to ensure the success of the Bellmon review program is to provide a companion system for providing feedback on the results of the review. While the information we obtain from the review is very helpful in guiding our training and continuing education efforts, I believe there must be a more individualized process for those ALJs in the individual category. Such a system is now being implemented. The purpose of the feedback system is to advise affected ALJs of decisional weaknesses and to provide a mechanism for achieving long term improvement.

Under the first stage of the feedback system the Chief Administrative Law Judge (CALJ) will send a memorandum to the appropriate Regional Chief Administrative Law Judge (RCALJ) enclosing a brief outline of the particular problems found in the decisions of that ALJ. Also enclosed will be summaries of several cases reviewed by the Appeals Council on its own motion with supporting documentation. The RCALJ, together with Deputy Chief Administrative Law Judge Irwin Friedenberg on occasion, will meet with the ALJ involved to discuss the problems reported and review steps that can be taken to improve the accuracy of his or her decisions.

Thereafter, a further review of the ALJ's decisions will be undertaken for three months to determine if there has been improvement. If no change has occurred the CALJ may either request additional counselling through the RCALJ or authorize special training in the region or in Central Office. If there is still no measurable improvement other steps will be considered.

Initially, because of staffing limitations, feedback will be limited to those individual ALJs who are included in the 100 percent review group. As the system progresses, all ALJs remaining in the individual group will be included in this process.

Louis B. Hays

12258-7-9922

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to: [illegible]

SEP 21

Memorandum

Date: SEP 15 1982

From: Associate Commissioner
for Assessment

Subject: Report on the "Uniformity of Disability Allowance Rates (Reversal Rates) Among Administrative Law Judges"--INFORMATION

To: OP
✓OHA
OOPP

Office of Assessment staff with assistance from staff in OOPP and OSI, recently completed an analysis of ALJ Disability Allowance Rates. The purpose was to determine if, after adjustments for types of cases heard, there remained significant differences in allowance rates among individual ALJ's. The caseload mix was made similar by adjusting the claimant age, education, impairment severity and body system. After making these adjustments, and after application of certain statistical procedures, the findings were:

1. There are statistically significant differences among Administrative Law Judges with respect to their allowance (reversal) rates for disability claimants at the hearings level.
2. These differences essentially remain after adjustments are made for claimant differences in terms of age, education, impairment severity, and body system involved.
3. There appears to be no significant correlation between either claimant age or education and allowance rate at the hearings level. Also there is comparatively little correlation between allowance at the hearings level and impairment severity.

The report which is attached is very technical because we considered it important to share with you, in this instance, not only a description of the data bases used, but also the statistical methodology and procedures employed in the analysis.

If staff desire further background on the study they should contact Angela Plum on extension 73528.

Janice L Warden for
Beverly A. Bedwell

Attachment

cc:
Mr. Simmons

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

File: Field
(ALJ Decisions)

Refer to: SGT31

Memorandum

7/1
~~LBH/ES~~

cc CALS
OFA
OA
OAG
~~7/2~~
~~(DALE)~~
MTC

Date: JUN 29 1982

From: Office of Management Coordination

Subject: Individual ALJ Reversal Rates -- INFORMATION

To: Mr. Louis B. Hays
Associate Commissioner
Office of Hearings and Appeals
Through: ES________

One of the criticisms OHA has received involves the large variation in reversal rates among ALJs. The review of ALJs under the Bellmon procedures was seen as one way of reducing this variance by reviewing the ALJs with high reversal rates to see if they could not be brought more in line with the other ALJs. What we would like to see is a decrease in the variance in ALJ reversal rates as well as a shift to lower reversal rates indicating more uniformity within the SSA process.

When we looked at the individual reversal rates for the first quarter of FY 1982 what we saw was not encouraging (Tab A). While the overall reversal rate had decreased the variance had increased. Both the number of high reversers and low reversers had increased with a decrease in the number of average reversers. However, since Bellmon review did not go into effect until October 1981 we could not expect any change until the judges had started getting some feed back.

The results in the second quarter of FY 1982 were much more favorable. While there was not a decrease in the variance among reversal rates the general trend was to lower reversal rates (Tab B).

Overall we are experiencing a shift to more lower reversing ALJs (Tab C). However, we have not seen a decrease in the variation of ALJ reversal rates. The standard deviation was 13 in FY 1981, 15 in the first quarter FY 1982 and 14 in the second quarter FY 1982. In addition, there has been an increase in

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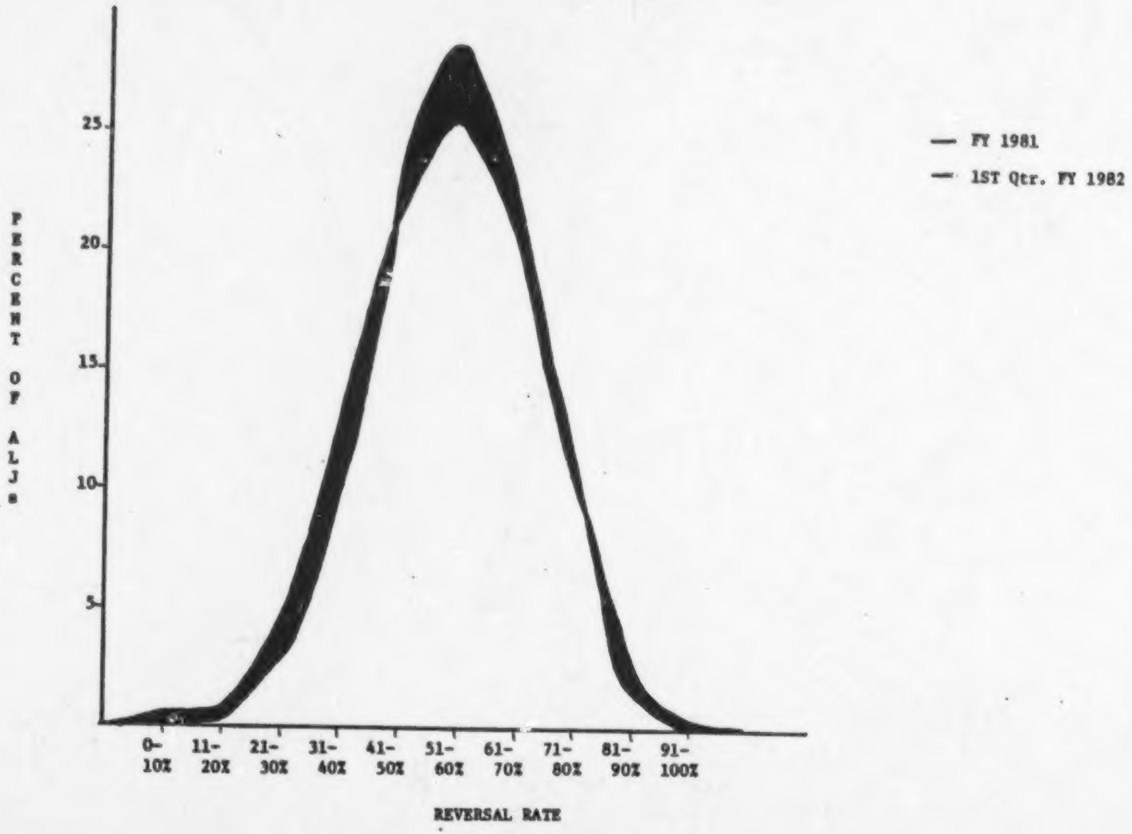
the percentage of ALJs reversing 81 percent or more of their cases. It is still too early to say whether or not the Bellmon review is having a positive effect on the reversal rate. Hopefully the two new groups of ALJs being put under review will help reduce the number of high reversers so that by the end of the year we will see a significant improvement.

Ralph F. Ives, Jr.
Acting Director

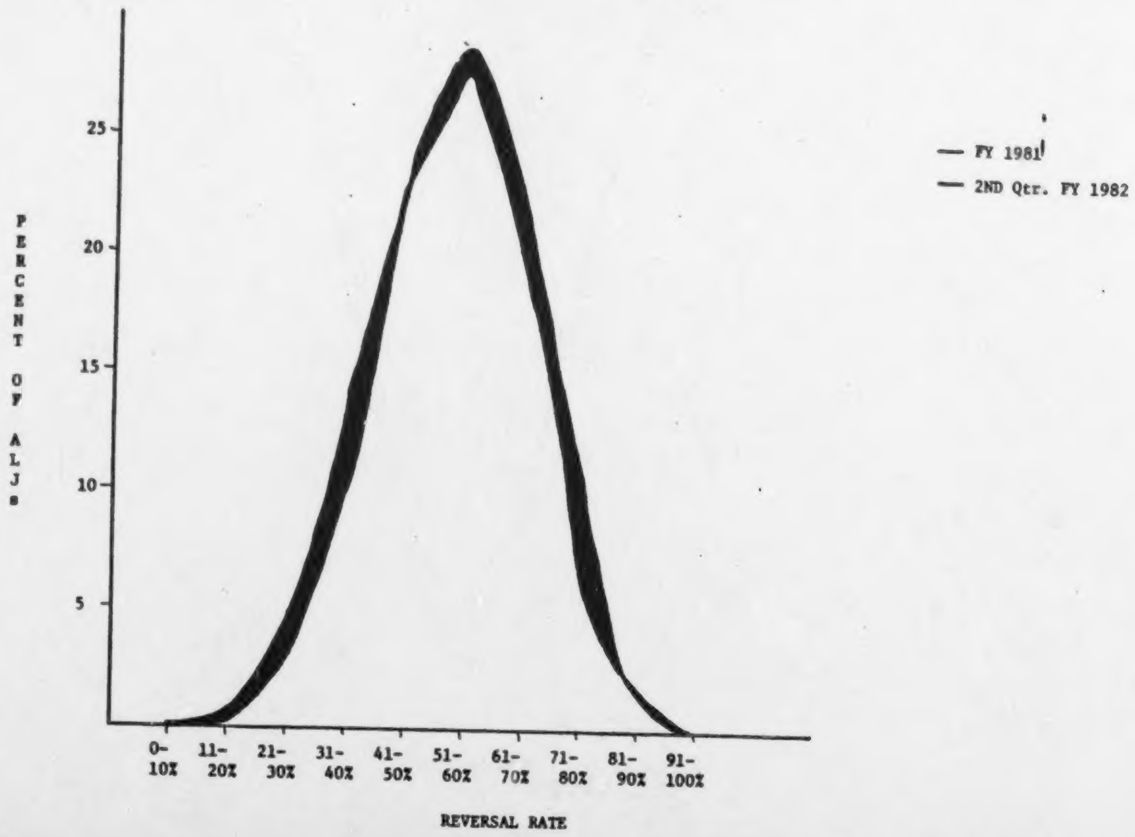
Attachments
Tab A - Reversal Rate By Individual ALJ, FY 1981 vs 1st Quarter FY 1982
Tab B - Reversal Rate By Individual ALJ, FY 1981 vs 2nd Quarter FY 1982
Tab C - ALJ Reversal Rates

cc:
OPA
OA

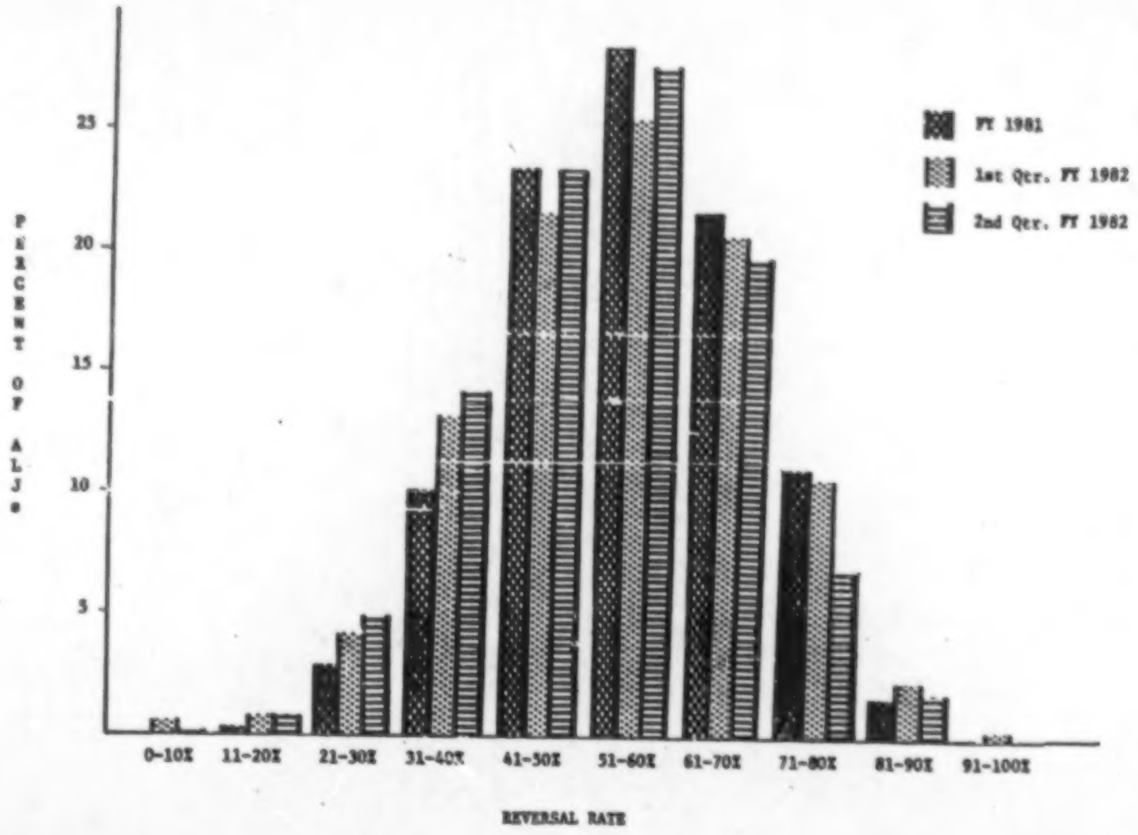
REVERSAL RATE BY INDIVIDUAL ALJ
FY 1981 vs 1ST QUARTER FY 1982



REVERSAL RATE BY INDIVIDUAL ALJ
FY 1981 vs 2ND QUARTER FY 1982



ALJ REVERSAL RATES



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SGR2

JUN 9 1982
Director, Office of Appraisal

Production Among Bellmon Targeted ALJs; Processing Time and Pending Case Data for HOs With at Least Two Targeted ALJs — INFORMATION

Mr. Louis B. Hays
Associate Commissioner
Office of Hearings and Appeals
Through: ES_____

In our memorandum of April 27, we informed you that the overall production for the group of targeted ALJs during the period from October through February had decreased by 17 percent, the total number of reversals they issued declined by 20 percent and their reversal rate dropped from 70 percent in October to 61 percent in February.

Subsequently, your Executive Assistant requested that we expand our previous memorandum to determine how the pre-Bellmon production among the targeted ALJs compares with current data. In addition, we have also compiled data which compares the processing time and the number of cases pending in those HOs where there are two or more targeted ALJs with national and/or regional averages to see what, if any, impact the Bellmon review might be creating in those offices.

A. Comparative Production/Reversal Rate Data

The chart below provides an "at-a-glance" comparison of monthly production statistics from two pre-Bellmon periods (April 1981 and July 1981) and three Bellmon periods for the original 66 targeted ALJs.

Month	Total Dispositions	Number of Reversals	Reversal Rate
April 1981	1,896	1,393	74%
July 1981	2,004	1,430	71%
October 1981	1,972	1,380	70%
January 1982	1,590	990	63%
March 1982	1,939	1,243	64%

Although total dispositions for January were significantly below the totals shown for the other months, by March, total production from this group was 97 percent of the 2,004 dispositions issued during July 1981. By contrast, the reversal rate in March was seven percent lower than in July. Also, we believe it is significant to note that this group of ALJs produced more dispositions in March 1982 than they did in April 1981, with a reversal rate drop of 10 percent.

13

DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to: SGP-2

Memorandur

22(82)
CL-19

Date: FEB 23 1982

From: Associate Commissioner
Office of Hearings and Appeals

Subject: Ruling of Non-Acquiescence-Continuance or Cessation of Grandfatheree's Disability - INFORMATION

To:
All RCALJs
All ALJICs
All ALJs

On April 16, 1981 the United States Court of Appeals for the Ninth Circuit issued a decision holding that Supplemental Security Income (SSI) benefits based on disability to a claimant who had been converted from the State welfare rolls to the Federal SSI program in January 1974 (grandfatheree) could not be terminated unless SSA showed that there was either a material improvement in the claimant's medical condition or a clear and specific error in the prior State determination.

I want to draw your attention to Social Security Ruling SSR 82-10c in the January 1982 quarterly Rulings publication, indicating the Social Security Administration's non-acquiescence in the Court's decision. Under SSA policy, it is not necessary to show that there has been improvement in the claimant's condition or any error in the prior State determination for benefits to be ceased. It is SSA's position that a grandfatheree's SSI benefits based on disability may be ceased when the claimant's disability, as shown by the current medical or other evidence, does not meet the criteria of the appropriate State plan or the Federal criteria—i.e., the impairment is such that the claimant is able to engage in substantial gainful activity (20 CFR 416.994).

Although the ruling addresses only criteria for ceasing disability for a grandfatheree, you should be aware that the criteria for ceasing benefits based on disability also apply where the claimant is a title II or SSI non-grandfatheree beneficiary. This basic policy is reflected in SSR 81-6 (January 1981, p.27).

Social Security Ruling SSR 82-10c is binding on all components of SSA including administrative law judges and the Appeals Council (20 CFR 422.408). SSA's policy must be followed in cases involving the issue of cessation of disability, including cases involving claimants who reside within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Louis B. Hays

Louis B. Hays

cc:
Office of Appeals Operations
Co-Deputy Chairperson, Appeals Council

DEPARTMENT OF HEALTH & HUMAN SERVICES

RECEIVED FEB 1 1982

Refer to SGA

Memorandum

Date. JAN 7 1982

From. Associate Commissioner
Office of Hearings and Appeals

Subject: ALJ Policy Council Meeting

To All Administrative Law Judges

I would like to share with you a summary of the topics and discussion at the meeting of the ALJ Policy Council held in Arlington, Virginia on December 2 and 3, 1981. The meeting was attended by Kathleen R. Dacey (Boston), Irwin Bernstein (Jamaica), Moses Thompson (Montgomery), Gordon L. Sroufe, (Columbus), John M. Slater (Tulsa), Edwin W. Ganter (Brentwood), Paul Smelkinson (Phoenix), Robert C. Wetherhold (Seattle), and Charles L. Leonard (RCALJ, Region II). The ALJ Association was represented by its President, Paul Rosenthal.

Adjudicatory Policy

We are continuing to work with the other SSA components to develop uniformity in adjudicatory policies and standards for all elements of SSA. Our goal is to ensure that all levels of adjudication are following a single set of policies and guidelines, as determined by the Secretary. We had extensive discussions during the meeting concerning how these policies are developed and the manner in which OHA is participating in the process. Rhoda Greenberg of the Office of Disability Programs and Frank Dell'Acqua, Deputy Assistant General Counsel, Social Security Division, participated during this portion of the meeting. Much of the discussion centered on the proposal to give binding policy effect to disability adjudication guidelines in the POMS. As the result of a suggestion by Paul Rosenthal, we are considering as an alternative the publication of one or more Social Security Rulings to establish a single set of adjudicatory standards for all levels to follow.

In general, there are four major efforts underway in the area of developing more uniform adjudicative standards:

1) We are working with ODP to identify the specific portions of the POMS that are relevant to the adjudicative standards.

2) Program Policy Statements are being developed for a number of major topics, including residual functional capacity and transferability of skills.

3) We are attempting to identify additional case type disability rulings for publication as Social Security Rulings to provide additional precedential guidance to adjudicators.

4) We are promoting a more systematic review of court decisions to better identify candidate cases for appeal. As part of the discussion on this subject, Frank Dell'Acqua stressed the point that the federal courts do not run SSA's programs, and that ALJs are responsible for applying the Secretary's policies and guidelines regardless of court decisions below the level of the Supreme Court. Court decisions can result in the changing of policies, but it is not the role of ALJs to independently institute those changes.

We are also re-examining the policies and procedures on claimant travel. During 1981, 51 percent of travel by ALJs occurred within 75 miles of the ALJ's office. Although it may be difficult to actually change the existing policies to extend the travel radius, there was general agreement from the Policy Council that OHA should more fully enforce the present policy. We will also encourage giving claimants the option to travel to the hearing office for their hearing, even if the distance is more than 75 miles.

Government Representative Experiment

The Government Representative experiment is being delayed at least until March 1982 so that a Federal Register Notice can be issued. Four offices will participate in the experiment. The goal of the experiment will be to evaluate the effect of a government representative on productivity and quality. Procedures for the role of government representatives are still being developed.

Blankenship

The government has filed a motion in the Blankenship case to obtain relief from the court-ordered time limits on the basis of drastically changed circumstances. We are arguing that the rapidly increasing workloads have changed the context of the original judgement, and have made the notion of time frame regulations and court-ordered time limits untenable. As a substitute, we are proposing to publish annually in the Federal Register a non-binding average processing time goal. If we are successful, we will not have to do special tracking of individual cases.

Attorney Fees

Proposed legislation is pending with OMB to eliminate SSA's involvement in attorney fee processing and approval. The Office of General Counsel is also analyzing the potential for regulatory change in this area. The Policy Council recognized that there are alternative remedies available for responding to problems that arise with certain attorneys aside from the fee authorization provisions.

Word Processing

The procurement of "state-of-the-art" word processing equipment for all hearing offices is underway. Installation will be on a phased basis beginning in Summer 1982. The equipment will include video display terminals and keyboards, and the printers will be capable of producing at twice the speed of our present equipment.

Minimum Number of Cases Per Hearing Trip

A proposed policy was recently circulated to the field for comment regarding the establishment of the requirement for a minimum of 25 cases per hearing trip. Many of the responses on this proposal failed to recognize that it includes ample leeway for ALJICs to grant exceptions as circumstances warrant. This policy has been developed in response to the Inspector General's criticism of abuses within OHA and is in no way linked to any attempt to establish productivity quotas.

Bellmon Review

The Bellmon "own-motion" review started on October 1, with 65 ALJs selected for review. Those ALJs who were selected have either the highest individual allowance rates or come from hearing offices with the highest overall allowance rates. The review covers 50 percent of the ALJs' allowance decisions on Title II and concurrent cases. For sample selection purposes, 100 percent of those workloads are being sent to Central Office. Sixteen hearings and appeals analysts are assigned to the review and are making recommendations for own motion to two Appeals Council members. There is an own motion recommendation rate of approximately 25 percent. Those cases on which the Appeals Council takes own motion are either reversed on the record or remanded to the ALJ. The Appeals Council is sending detailed descriptions of deficiencies to the ALJs for all own motion cases. Approximately seven and one-half percent of all ALJ allowances are now being reviewed. The number of cases will be doubled by April 1982 as additional analysts become available to participate in the review. Once the larger case review capability is achieved, a random sample of all ALJ allowance decisions will be added to the review.

A second aspect of the Bellmon amendment is the requirement for a report to the Congress concerning a study of the problems and differences in the adjudicative standards and approaches used at the various levels in the decisional process. The report, which is now being completed, concludes that there are major differences between OHA and the DDSs and between ALJs and the Appeals Council within OHA.

Quality Control System

We are revamping OHA's Quality Control System to develop a mechanism to provide more direct and specific feedback to the field. I am concerned that the information generated by the present system is so general as to be of very limited utility. We are attempting to design a new procedure that will provide much better information to the field.

The Policy Council generally agreed that an improved quality control mechanism of this nature is needed to allow better identification of training needs and to accentuate areas where policy clarification is required.

Reconfiguration

The original reconfiguration experiment involving six offices has led to expansion to approximately 30 offices in 1982. We will give priority in allocating resources, both in personnel and equipment, to these offices. Central Office and the Regional Offices will be working closely with all of the offices to assure smooth implementation. We are very mindful of the potential for short-term negative effects on productivity during implementation of the new processes, as pointed out by the Policy Council. However, we cannot ignore the significant potential long-term gains. In addition to the full reconfiguration of these 30 offices, we will also be encouraging other forms of innovative work processing.

Staff Attorneys

There continues to be a high degree of interest in finding a method by which staff attorneys can qualify as ALJs. In view of our need to hire a large number of additional ALJs this year, we have to explore every opportunity to find high-quality candidates. Our staff attorneys could provide an excellent pool of such individuals.

The Policy Council agreed that staff attorneys should not be barred from qualifying for the ALJ register. The basic issue is to find a method to fulfill the requirement that candidates already working for the government must have one year of experience at the GS-14 level. It appears that the best method to address this problem would be to have OPM give approval for the experience of a GS-13 staff attorney as fulfilling the requirement for time in grade as a GS-14. OHA could then pursue the approval of supervisory GS-13 staff attorney positions in the Regional Offices and Hearing Offices. We are not presently pursuing any other alternatives, such as establishing GS-14 hearing examiners.

Field Training Initiatives

We have established a Field Training Initiative Staff in Central Office under the direction of Irwin Friedenborg of the Washington, D.C. Hearing Office. Irv is working with Tom Capshaw to offer five continuing education seminars for ALJs beginning in April 1982. Each of these seminars will include a one and one-half day ALJ refresher training session in addition to the time utilized by the Continuing Judicial Education Committee. Additional training for all hearing office support staff is also being developed. OHA has allocated almost six times as much money for training in 1982 in comparison to last year.

Once again, the Policy Council meeting provided a frank and open exchange of ideas on the important issues facing OHA. The advice and opinions expressed by all of the participants were extremely valuable and resulted in several significant policy decisions.

Louis B. Hays

Louis B. Hays

cc: RCALJs
OHA Executive Staff

DEPARTMENT OF HEALTH, EDUCATION, AND ~~WELFARE~~

SGR2

DEC 29 1981

Director, Office of Appraisal

Characteristics of the "Ideal" Hearing Office, FY80 — INFORMATION

Mr. Louis B. Hays
Associate Commissioner
Office of Hearings and Appeals
Through: O______
ES______

PURPOSE

To confirm the findings and strengthen the conclusions of last year's "Ideal" Hearing Office study. The results may be useful in determining whether additional field offices should be established, HO service areas realigned and/or resources allocated or reallocated among contending HOs.

BACKGROUND

In December 1980 OA issued a report on an initial "Ideal" Hearing Office study which used data from FY78 and FY79 to determine (and identify) whether there were objective characteristics common to hearing offices considered to be the most effective as measured by four performance indicators. The attached report, which incorporates FY80 data, updates and expands the results of the earlier study.

FACTS

To determine whether there were resource characteristics associated with different performance levels, we compiled and reviewed data on HO production, processing time, cost per case and quality review for all offices and established an "effectiveness" or high performance ranking based on these factors. We also established a separate ranking based on these four plus reversal rate as a fifth performance indicator. We then analyzed the resource characteristics of the high and low performing HO's.

According to the data for FY80, the most effective of our hearing offices is characterized by an average disposition rate of 45 cases per month and processing time of 126 days. On average, this "ideal" hearing office has three ALJs, a support staff ratio of 4.5 to one and a word processing machine ratio

The least effective of our hearing offices is characterized by an average disposition rate of 20 cases per month and processing time of 205 days. On average, it has six ALJs, a support staff ratio of 3.7 to one and a word processing machine ratio of .4 to one. For each ALJ there are .5 staff attorneys, 1.1 hearing assistants, and 1.6 clerks.

Detailed findings are presented in the attached study report and charts.

CONCLUSIONS

Our findings for FY80 generally confirmed the FY78 and FY79 results. Our data generally indicate that a smaller hearing office is somewhat more likely to be a high performing office than a larger one although there are large offices that perform at high levels. The data also show that the [illegible] support staff ratio tends to be higher in the better offices. Word processing machine to ALJ ratios also tend to be higher in our most effective offices, and the best offices have more office space per ALJ than HOs ranked at the bottom. We also found that, when reversal rate was factored into the system for ranking the HOs, the associated findings about resources were essentially unchanged. Finally, our data pointed to a finding that ALJs from the most effective HOs tended to travel quite a bit more than ALJs from the least effective HOs.

Obviously a complex mix of ingredients goes into the making of an "ideal" hearing office. Certainly objective factors alone are not the sole components. Perhaps such subjective and intangible factors as the personal traits of the employees and how HO personnel at all levels interact with each other are more important to high performance than more measurable elements. However, our study shows that there is a clear relationship between some of the factors that we can control and the overall quality of performance. Even though there is no guarantee that allocating resources in amounts suggested by the findings of this study will automatically improve performance, we believe they chart a general direction, which, as it happens, coincides with many of your ACTS initiatives for improving field performance over the next year.

Levi J. Ogden

Attachment

(Note: Attachment retained in Subcommittee files.)

14

DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to: SGA

Memorandum

Date: DEC 16 1981

From: Associate Commissioner
Office of Hearings and Appeals

Subject: FY 81 Workloads and Comparison to FY 80

To: All Administrative Law Judges

Now that we have complete data for fiscal year 1981 (the 12-month period ending September 30, 1981), I thought you would be interested in seeing how the statistics for the year compared with the previous fiscal year (FY 80).

Total receipts increased from 252,023 to 281,737, dispositions increased from 232,599 to 262,609 and the year-end pending caseload increased from 109,636 to 128,764. The average number of ALJs on duty during the year increased from 669 to 699, and the average disposition rate per ALJ rose from 30 per month to a record high of 32. Regional average ALJ disposition rates for FY 81 ranged from a low of 27 per month to a high of 36. Average processing time increased from 159 days to 164 days.

The average allowance rate based on total dispositions declined from 55.8 percent to 55.2 percent. The average allowance rate based on decisions declined from 61.8 percent to 61.3 percent. This represents the first decline in the annual allowance rate since fiscal year 1974.

At the Appeals Council, receipts increased from 49,742 to 55,912 and dispositions rose from 49,466 to 54,095. The grant review rate declined from 12.9 percent to 12.5 percent.

At the State agency level, initial claims processed decreased from 1,695,906 to 1,602,809. The denial rate for initial claims increased from 60.4 percent to 62.9 percent. At reconsideration, the number of claims processed increased from 420,816 to 455,667, with a corresponding increase in denials from 345,819 to 382,379. The denial rate increased from 82.2 percent to 83.9 percent.

Total full-time permanent staff in the Office of Hearings and Appeals increased from 4,361 to 4,559. The bulk of the increase was in the field which rose from 3,618 to 3,748.

On balance I believe we had a very good year. Due to your efforts we are on our way to meeting the challenge of the escalating caseload. Our progress can be seen by the disposition rates you have achieved in the months of September and October--33 and 34.5, respectively. I want to take this opportunity to thank all of you for your work during the fiscal year and your contribution to the success of the Office of Hearings and Appeals.

Louis B. Hays

cc: Regional Chief Administrative Law Judges
OHA Executive Staff

Chron
10-30-138

DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to: SGE2

Memorandum

15

Date: DEC 1 1981

From: Associate Commissioner
Office of Hearings and Appeals

Subject: Hearing Office Reconfiguration

To: All Administrative Law Judges

At a recent meeting with the officers of the Association of Administrative Law Judges, I was asked to share with you additional information about reconfiguration and the reasons I have been impressed with its results.

Hearing office reconfiguration involves doing our day-to-day business in a different fashion. In its simplest terms, it changes the existing individual ALJ hearing unit method of case processing in favor of specialized units. These specialized units handle various aspects of case processing such as development, decision writing and decision typing and mailing in a centralized fashion. A major benefit of this system is that it is not solely dependent on an individual's ability (either the ALJ, or hearing assistant, or staff attorney, etc.,) but rather capitalizes on group accomplishment. It eliminates or significantly reduces the peaks and valleys normally created by someone's absence or the ability of some to produce more work than others.

The purest application of this concept of functional organization is in the Des Moines Hearing Office. During the experimental period of October 1980 through July 1981, the office staff consisted of five ALJs, two staff attorneys, five hearing assistants, nine clericals, and a hearing office manager. The support staff ratio of 3.4 was well below the national average of 4.2 for the period, yet the monthly disposition average steadily increased, and in July was 43 cases per Administrative Law Judge. Although the support staff ratio subsequently increased, the monthly disposition rate is now averaging about 60 cases. In addition to the rise in productivity, processing times have been reduced to an average of 90 days per case.

The Des Moines Hearing Office is organized around a set of working teams who provide support services to the ALJs, rather than individuals assigned to units. Amidst these teams of hearing assistants, hearing clerks, and staff attorneys, there is a central contact point where a legal clerk maintains control of the stages of case development through a coding and filing system. After cases are assigned to an ALJ, they are worked up by a hearing assistant. The hearing clerks do both pre-development and post-development work, as necessary.

The ALJs plan their itineraries, telling the scheduling clerk how many cases they will take, and where, up to six weeks in advance. The ALJIC monitors this case assignment process.

The hearing clerks send the notice of hearing, and the hearing is held. If post hearing development is necessary, the case is returned to a development clerk. The ALJs select which decisions they will write, while others are assigned in rotation to the staff attorney team. After a decision is dictated, it is sent to the mag card room for typing. It is then reviewed by the writer and sent to the ALJ for final changes and signature. Finally, the case is logged in for mailing.

It is most important to note other factors that contribute to the success of the office. It has excellent leadership by the ALJIC and the hearing office manager, and a great deal of involvement on the part of all staff members in making decisions on how work is to be accomplished.

While aspects of reconfiguration are also being carried out in several other offices, the results have not been as dramatic, thus far, as they have been in Des Moines. Overall, the hearing offices involved in this experiment increased their productivity by 37 percent during the period of May through October 1981 as compared to the same period last year. Productivity in all other offices increased by 10 percent.

I have been impressed with these results and have concluded that this approach is a valid one that should be employed in offices where performance needs improvement to meet the challenge of the ever rising caseload. I recognize that reconfiguration may not work in all hearing offices. I realize that some offices are performing well under the unit concept. However, I am convinced that there are better ways to utilize staff and that the Des Moines example has considerable merit.

By the end of this fiscal year we hope to have approximately 30 offices in the reconfiguration program. At this point, I have asked that offices volunteer to participate as they see a need and as they gain readiness. As each region achieves one or more offices in reconfiguration, I hope that other offices in the region will consider the benefits that I am confident will be demonstrated and choose to reconfigure.

Louis B. Hays

cc: RCALJs
Executive Staff

DEPARTMENT OF HEALTH & HUMAN SERVICES

6 Copies

Memorandum

RESP. COMP: PGAS

Copies to:

RC/DRC ✓
XO/XA ✓
~~All~~ ARC'S [illegible]
DIR-PGAS ✓
DIR-CREO

Date November 19, 1981

From Regional Chief Administrative Law Judge
Region V, Chicago

Subject Studies of Reasons for ALJ's Reversals and Affirmations.

NOV 30 REC'D

To Marlene M. Moleski
Acting Regional Commissioner

KB
JW

Since I became Regional Chief Administrative Law Judge in early 1975, studies of ALJ's reversals have been made by every change of administration. I have also found several prior studies, notably the "Dixon Report."

In May of 1976 the Center for Administrative Justice was contracted to conduct a 15 month study of the Hearing System, and in June of 1978 the Administrative Conference of the United States adopted resolutions based in part on this study recommending to Congress that the basic system of ALJ's operating under the Administrative Procedure Act (APA) remain unchanged but emphasized greater use of vocational factors in evaluating disability cases.

In 1980 the OHA Office of Appraisal studied the matter. Attached is a summary of that study. In addition to the factors enumerated in the Office of Appraisal report, a significant factor in the past few years has been the Decisions of Federal Courts in the area of pain, vocational factors, burden of proof and due process. This has resulted in ALJs' being required to consider factors beyond the scope of regulations. The leading cases on these points would fill volumes. I have therefore attached a copy of a brief on the subject which illustrates how much broader the scope of an ALJ's view of a case is than that of the State Agency's.

There are of course, cases upholding the APA which provides that the case before an ALJ is a "De Novo" case; that the ALJ is not bound by previous determinations and must make a new and independent decision based on the relevant evidence properly before him as due process requires, adhering to minimum standards of rules of evidence and the rulings of the courts.

Thus, it is legally incorrect to refer to an ALJ's Decision as a 'Reversal', it is really a new case.

I would be glad to discuss this further if you like.

Allen E. Gramza
Regional Chief Administrative Law Judge

ASSIGNED TO

CC: ARC-P
DARC-P ✓
SA ✓
APB ✓
~~DPB~~ ✓
IPB ✓
SOB
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FILE ☐

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SSA
OFFICE OF ARC-PROGRAMS

Status of DARE Project - Study of Reasons for ALJ Reversals and Affirmations (OHA Initiative)

After completing a special study of 1,021 ALJ disability dispositions (605 reversals and 416 affirmations) in OHA, the Office of Appraisal compiled and analyzed the data and issued a report in November 1980. This study revealed no substantial deficiencies in State agency evidentiary development, case processing, or disability evaluation, as these activities are generally practiced at the reconsideration level. At the same time, however, the study confirms that the factors impacting on the ALJ decision-making process and it substantially higher allowance rates are: (1) the great amount of additional evidence received at the hearing level (most of which provides new information on claimant's impairments); (2) the oral hearing that provides the ALJ with testimony and observations of the claimant; and (3) the high rate of participation by claimants' representatives.

At the reconsideration level State agency evidentiary development was judged to be complete in almost 86 percent of the cases coming to hearing. The degree of DDS developmental and analytical completeness was, however, greater in cases where the ALJ ultimately affirmed the reconsideration determination than when the ALJ reversed it. State agency written determinations reflected consideration of all claimant-alleged and/or medically indicated impairments in 88 percent of the reversals and 90 percent of the affirmations. Also, the State agency resolved all outstanding issues and questions in almost 79 percent of ALJ reversals, while the rate was about 87 percent in ALJ affirmations.

At the hearing level additional evidence was submitted in 78.4 percent of the cases subsequently reversed. Most of this evidence provided new information on the claimant's impairments. The additional evidence submitted in cases subsequently affirmed contained substantially less new information. Overall, evidence of a worsening condition appeared at the hearing level in nearly a third of the reversals but only 6.5 percent of the affirmations. Claimant representatives participated in hearing proceedings in 65.5 percent of reversals and in 50 percent of affirmations. Only nine percent of claimants were represented at the reconsideration level. Expert witnesses, primarily vocational experts and medical advisors, testified in almost 17 percent of reversals and in about 14 percent of affirmations.

In summary, the great influx of additional evidence at the hearing level, the high rate of claimant representation, and the multiple advantages of the oral hearing are seen, to a large extent, as accounting for the differing decisional findings and conclusions by ALJs compared with State agency reconsideration determinations.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to: SGA

Office of Hearings and Appeals
PO Box 2518
Washington DC 20013

July 21, 1981

New Orleans, Louisiana 7011
JUL 27 1981
Office of Hearings and Appeals

TO: All Administrative Law Judges

FROM: Associate Commissioner for Hearings and Appeals

I am very proud and excited that Secretary Schweiker and Commissioner Jack Svahn have asked me to serve as Associate Commissioner for Hearings and Appeals. Since one of my highest priorities is to work closely with the corps of administrative law judges, I wanted my first official correspondence as Associate Commissioner to be with you. I regret that time and geography prevents this message from being delivered in person.

At this early stage of my tenure, I have three fundamental goals for OHA. First, we must assure due process for claimants and beneficiaries and improve the quality of the decisional process. Second, we must protect the rights of the government and the taxpayers. The third is more difficult: we must all work together to restore the credibility and assure the future viability of OHA and the adjudicative process you carry out.

Let me be very candid. It has been my experience that we are held in low regard by the rest of SSA, the States, the Department and the Federal Government. We are perceived by many, rightly or wrongly, as taking unreasonably different approaches to deciding cases, as having untenable reversal rates, and being generally unaccountable for our actions. I believe that you and I have a limited time to work together to correct these perceptions before solutions are imposed upon us by outside forces beyond our control.

I believe little is served at this point by attempting to assess blame or fault. Instead of debating whether the States, SSA or OHA are right or wrong, we must face the reality of the perceptions of the outside world and concentrate on solutions to the extent they are within our control.

I do not wish to sound negative or pessimistic. I strongly feel that by working together we can solve the problems we face. I would not have accepted this assignment if I felt otherwise. I will not be able to do it alone, however. I need and want your help, and I expect you to rise to the challenge.

Let me hasten to add that I respect your decisional independence and will not attempt to interfere with it. The t[illegible] goals I have outlined are entirely consistent with your decisional independence and are designed to assure it in the future. At the same time, I do not believe that one can hide behind the concept of decisional independence. I am accountable to the Commissioner, the Secretary, the Congress and the taxpayers. So too, through procedural safeguards, are you.

I look forward to working with you, through the Policy Council and other mechanisms, and talking with you when I travel around the country. Until then, I welcome and invite your ideas and recommendations for solving the problems we face.

Louis B. Hays

Louis B. Hays

cc: Regional Chief Administrative Law Judges
Headquarters Executive Staff

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SGR1

JUL 0 8 1981

Director, Office of
Appraisal

Report on Quality Review for October through December 1980 ACTION

Mr. Andrew J. Young
Associate Commissioner
Office of Hearings and Appeals
Through: O ______
ES ______

Attached at Tab A is the Report on Quality Review for October - December 1980. This report contains the results of a sample review of October, November and December affirmations/dismissals, reversal decisions and protest cases. Because the sample was not our normal random sample but a combination of regular sample and cases from the preliminary Bellmon review, we have not made the usual comparisons of deficiency rates over time. This has forced us to alter the report format to some degree.

The quality review data for October through December 1980 revealed the following:

1. The overall deficiency rate was 11.2 percent in December 1980. In large part, this substantial increase over the preceding period can be attributed to the great proportion of cases from the preliminary Bellmon review included in this quarter's sample.

   Bellmon cases comprised about 80 percent of the total QR sample. These cases differed from regular QR cases both in sample selection parameters and in the manner in which the cases were reviewed. Whereas all ALJ dispositions are subject to random selection for regular QR purposes, for Bellmon, the sample was different in that it was stratified according to ALJ reversal rate ranges, excluded dismissals, included only disability issues under Titles II and XVI and involved more than twice as many reversals as affirmations. Also, the retrieval success rate for reversals was considerably higher because of the SSA level effort in Bellmon.

Quality review of Bellmon cases was performed by a small group of hearings and appeals analysts. These analysts reviewed Bellmon cases exclusively and worked directly with a Council Member who also concentrated on Bellmon review. Because of this arrangement, we expected that analyst identified defects would be confirmed more often by the Appeals Council than in regular QR. In 97 percent of such cases, the Appeals Council confirmed the serious defects identified by the analysts. In contrast, for regular QR over the last 14 months, the AC confirmation rate was only 59 percent. The high confirmation rate on the Bellmon related cases was largely responsible for the increased defect rate reported this quarter.

2. There was a total of 197 serious deficiencies among the 1,760 cases reviewed. About 45 percent of the serious defects were developmental errors; about 38 percent were evaluative flaws; about 15 percent were program defects; and about 2 percent were procedural errors. Fifty-three defects (27 percent of the total) involved an incorrect conclusion about disability and 47 defects (24 percent of the total) occurred where the ALJ did not obtain a needed consultative examination.

3. Less serious defects, or "areas needing improvement" occurred most frequently in the program area, followed by the developmental, evaluative, and procedural areas, respectively. The three most frequently identified problems involved failure to obtain a needed RFC assessment, incomplete findings about RFC, age, education, skill level or transferability, and failure to follow sequential evaluation in disability cases.

4. The majority of protest cases this quarter continued to involve disability issues (73.6 percent) and the most frequently recorded errors in each program were the same as have been noted in previous QR reports: conflicting onset dates; failure to reopen; insured status not met; and work after onset not considered. There was, however, a significant reduction in the number of HI protests cases received, down to seven this quarter from an average of 40 per quarter over the past two years. We have no explanation for this marked decrease.

I recommend that you approve the release of the report by signing the memorandum at Tab B.

Jack Camilleri

cc: DAC (P)

Attachments:

TAB A - Quality Review Report for October-December 1980.

TAB B - Memorandum releasing Report on Quality Review for October-December 1980.

(Note: Attachments retained in Subcommittee files.)

11054-38-1606 ~~J. Miller~~

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE ㉓
SOCIAL SECURITY ADMINISTRATION

file
CHRON

1981 FEB 25 PM 3:13

TO : Regional Chief Administrative Law Judges
Administrative Law Judges in Charge
Administrative Law Judges

DATE: FEB 23 1981

HGE1

FROM : Andrew J. Young
Associate Commissioner
Office of Hearings and Appeals

SUBJECT : It's Back

Are you aware that the Backlog is back - all 119,680 cases of it? Today's Backlog, unlike its predecessor of a few years ago, results from a succession of events largely beyond our control. Despite sustained high levels of performance by virtually all of you, our pending workload increased almost 20 percent during 1980, from 96,918 to 115,809. By this summer, unless we can do something about it, our Backlog will reach an unthinkable 130,000 cases. Because of this I feel an obligation to bring to your attention the critical nature of this situation and request the assistance of each of you as well as each member of your support staffs.

We simply cannot, in light of our obligation to provide fair and timely hearings, allow the Backlog to escalate. It is extremely unlikely that we will be able to recruit material numbers of additional ALJs or support personnel, or provide a massive infusion of equipment and other resources as we did previously. You will have to look to yourselves, to your own staff resources and to the work patterns which you and your unit have established to find ways to meet this challenge. Can your hearing assistant schedule two additional cases for hearing each week? How can you change the pattern of your work so that you can hear and decide those two additional cases? Can your staff attorney find the time to write the decisions, or can the ALJIC assist you in getting them written? How can your staff or the ALJIC and the hearing office administrator assure that two extra cases will be typed and mailed? Can another office help? If each of you meet this challenge--two cases a week--we can wrest 72,000 cases from the Backlog, cut it down to less than half its present size, in just 12 months.

I am confident that we can, through a modest but aggressive individual effort by each OHA employee, beat the Backlog.

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

TO : Regional Chief Administrative Law Judges
Administrative Law Judges in Charge
Administrative Law Judges

DATE: MAY 27 1981

REFER TO: SGE1

FROM : Andrew J. Young
Associate Commissioner
Office of Hearings and Appeals

SUBJECT : A Word of Appreciation

When I sent the "It's Back" memorandum to you in February of this year, I had no idea what reaction to expect. When a few angry responses from judges arrived (most from a single hearing office) calling my "It's Back" message an "insult to intelligence" and a statement of "mind-boggling" audacity, I had a momentary and unsettling vision of good intentions gone awry. However, the negative responses were few in number. From the majority of judges I heard nothing about "It's Back"; that is, until the March performance data began to be reported. In March, OHA judges averaged 33 decisions per judge, the highest national average ever attained. You are to be congratulated for this accomplishment, and you should take special pride in the fact that this was achieved under hiring and resource freezes which left many of you without full support.

One purpose of the "It's Back" memorandum, perhaps its chief purpose, was to define the backlog -- to state how large it had become and how much larger still it could become. We in Arlington are accustomed to a national view of OHA's problems and needs, and the backlog which we saw at the time of my February message to you looked mountainous. I was compelled to offer you a glimpse of it. Your reaction was, I am proud to report, predictable. As in previous crises which OHA has faced, you responded unselfishly and in the spirit of dedicated public service which has in my experience always characterized the overwhelming majority of the ALJ Corps.

The challenge of the backlog remains before us. I wrote in February that I am confident we can beat the backlog through modest but aggressive individual efforts. Judging from your performance in March, my confidence is not misplaced.

Congratulations, again, and thank you.

Continuing Disability Investigations1/

Fiscal Year	Initial				Reconsideration				ALJ Hearing					Appeals Council
	Processed2/	Decisions	Continuances (Percentage of Decisions)	Cessations (Percentage of Decisions)	Requests3/	Decisions	Continuances (Percentage of Decisions)	Cessations (Percentage of Decisions)	Requests	Decisions	Continuances (Percentage of Decisions)	Cessations (Percentage of Decisions)	Dismissals (Percentage of Decisions)	
1981 (3/81-9/81)	180,000	146,000	76,000 (51.8%)	70,000 (48.2%)	Not Available	Not Available	Not Available	Not Available	Not Available	Not Available	Not Available	Not Available	Not Available	Not Available
1982	497,500	435,000	240,000 (55.1%)	195,000 (44.9%)	111,000	96,000	12,000 (12.7%)	84,000 (87.3%)	61,000	41,000	(Available 2/82-9/82) 25,000 (61.3%)	13,000 (31%)	3,000 (7.7%)	
1983 (10/82-3/83)	288,000	222,000	121,000 (54.4%)	101,000 (45.6%)	79,000	66,000	10,000 (15%)	56,000 (85%)	55,000	47,000	28,000 (60.5%)	16,000 (33.4%)	3,000 (6.1%)	
Total (3/81-3/83)	965,500	803,000	437,000 (54.3)	366,000 (45.7%)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

1/ Includes title II and titles II/XVI concurrent cases and includes medical diary cases as well as periodic review cases. Figures rounded to nearest thousand but percentages based on actual figures.

2/ Includes no decision cases--cases where the State agency makes no decision for various reasons, e.g., death of the beneficiary, transfer of jurisdiction to another State agency, return of case to SSA district office for further development or because beneficiary is working.

3/ Title II only; concurrent title II/XVI cases go directly to ALJ hearing.

RULINGS OF NON-ACQUIESCENCE PUBLISHED BY THE SOCIAL SECURITY ADMINISTRATION IN THE SOCIAL SECURITY RULINGS, 1968-1983

1. SSR 68-48c. SECTION 211(a).—SELF-EMPLOYMENT—HUSBAND-WIFE OPERATION OF JOINTLY OWNED HOTEL Rasmussen v. Gardner, 374 F.2d 589 (10 Cir., 1967). CUMULATIVE SOCIAL SECURITY RULINGS FOR 1966-1970, p. 272.

2. SSR 80-10c. SECTION 205(a) and 205(g) (42 U.S.C. 405(a) and 405(g)) PRESUMPTION OF DEATH—ABSENCE FOR SEVEN YEARS NOT UNEXPLAINED--A RULING OF NONACQUIESCENCE. 20 CFR 404.721(b). Johnson v. Califano, 1A Unemployment Insurance Reporter (1979 Transfer Binder) ¶16,390 (6th Cir. 1979). CUMULATIVE SOCIAL SECURITY RULINGS FOR 1976-1980, p. 142.

3. SSR 80-11c. SECTION 1611(e)(1)(A) (42 U.S.C. 1382(e)(1)(A)) SUPPLEMENTAL SECURITY INCOME--ELIGIBILITY—INMATE OF PUBLIC INSTITUTION—A RULING OF NONACQUIESCENCE. 20 CFR 416.231. Levings v. Califano, No. 79-1100 (8th Cir. Aug. 29, 1979). CUMULATIVE SOCIAL SECURITY RULINGS FOR 1976-1980, p. 455.

4. SSR 81-1c. SECTION 216(h)(3)(C)(ii) (42 U.S.C. 416(h)(3)(C)(ii))--CHILD'S INSURANCE BENEFITS—ENTITLEMENT OF ILLEGITIMATE CHILD--CONTRIBUTIONS TO SUPPORT--A RULING OF NONACQUIESCENCE. 20 CFR 404.355(d) and 404.366(a). Boyland, et al v. Califano, 1A Unemployment Insurance Reporter (CCH) ¶16,912 (6th Cir. 1980). CUMULATIVE SOCIAL SECURITY RULINGS FOR 1981, p. 12.

5. SSR 81-28c. SECTIONS 202(d) and 216(e) (42 U.S.C. 402(d) and 416(e)) CHILD'S INSURANCE BENEFITS--DEFINITION OF A STEPCHILD--A RULING OF NON-ACQUIESCENCE. 20 CFR 404.357 and 404.362(b)(3). Hutcheson v. Califano, 638 F.2d 96 (9th Cir. 1980). CUMULATIVE SOCIAL SECURITY RULINGS FOR 1981, p. 8.

6. SSR 82-10c. SECTION 1614(a)(3)(E) (42 U.S.C. 1382c(a)(3)(E) SUPPLEMENTAL SECURITY INCOME--CONTINUANCE OR CESSATION OF A GRANDFATHEREE'S DISABILITY—A RULING OF NON-ACQUIESCENCE. 20 CFR 416.994(e). Finnegan v. Matthews, 641 F.2d 1340 (1981). CUMULATIVE SOCIAL SECURITY RULINGS FOR 1982, p. 303.

7.* SSR 82-33c. SECTIONS 216(i) and 223(d) (42 U.S.C. 416(i) and 423(d)) DISABILITY INSURANCE BENEFITS—INABILITY TO PERFORM PREVIOUS WORK—ADMINISTRATIVE NOTICE UNDER THE MEDICAL-VOCATIONAL GUIDELINES OF THE EXISTENCE OF OTHER WORK--A RULING OF NON-ACQUIESCENCE. 20 CFR 404.1560, 404.1569. Campbell v. Sec. of HHS, 665 F.2d 48 (2nd Cir. 1981). CUMULATIVE SOCIAL SECURITY RULINGS FOR 1982, p. 152.

8. SSR 82-49c. SECTION 1614(a)(3)(A) (42 U.S.C. 1382c(a)(3)(A)) SUPPLEMENTAL SECURITY INCOME--CONTINUANCE OR CESSATION OF A NON-GRANDFATHEREE'S DISABILITY--A RULING OF NON-ACQUIESCENCE. 20 CFR 416.994. Patti v. Schweiker, 9th Circuit, Civ. No. 80-5763 (2/18/82). CUMULATIVE SOCIAL SECURITY RULINGS FOR 1982, p. 311.

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* A new ruling (draft attached) is in preparation for publication, based on the May 16, 1983, decision by the Supreme Court in HHS v. Campbell. It will supersede SSR 82-33c.

ADDITIONAL RESPONSES FROM SSA FOR THE RECORD

INSERT FOR THE RECORD

How SSA Determined That ALJ Denial Decisions Are Often Less Defective Than ALJ Allowance Decisions

In FY 1982, the Appeals Council reviewed approximately 65,000 ALJ denial decisions from claimant-initiated appeals and 12,000 ALJ allowance decisions under its own-motion (Bellmon) authority. The criteria applied by the Appeals Council in determining whether to review a case are contained in the regulations and apply equally to both claimant-initated appeals and cases reviewed under own-motion authority. The Appeals Council will review a case if (1) there appears to be an abuse of discretion by the ALJ; (2) there is an error of law; (3) the ALJ's action, findings or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue that may effect the general public interest. Thus, the rate at which the Appeals Council granted review under each of the two types of cases is an indication of the errors or defects contained in those cases. The Council granted review in 10.8 percent of the claimant-initiated appeals of denial decisions and 18.1 percent of the cases reviewed under its own-motion authority.

It should be noted that the 10.8 percent rate for denial decisions is somewhat inflated since the decision to review a denial is frequently based on consideration of new evidence submitted by the claimant rather than on defects in the ALJ's decision. On the other hand, additional evidence is not a factor when the Council decides to review a decision on its own motion, since few claimants submit additional evidence after receiving a favorable decision from the ALJ.

ALJs on Bellmon Review as of October 4, 1982 Because of Their High Allowance Rates

The Bellmon review program, which started on October 1, 1981, was initially limited to approximately 7½ percent of all title II and title II/XVI concurrent disability allowance decisions issued by hearing offices and individual ALJs selected on the basis of allowance rates of 70 percent or higher, and 74 percent or higher, respectively. On April 1, 1982 the case-selection criteria for the program were redesigned. One change at that time was to remove entire hearing offices from review. Of the 113 ALJs who were on Bellmon review as of October 4, 1982, 105 had been placed on review because of high individual allowance rates. The eight remaining ALJs were originally included on review because they came from hearing offices with high allowance rates, although their individual allowance rates were not high. Those eight ALJs had not been removed from review as of October 4, 1982, either because their own-motion rates were found to be high or because a sufficient number of their cases had not been reviewed to make a determination on whether they should be removed. (An ALJs own-motion rate is the percentage of his decisions over which the Appeals Council takes jurisdiction and either reverses the decision or remands it to the ALJ for further proceedings.)

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
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SUSAN M. COLLINS, STAFF DIRECTOR

July 6, 1983

The Honorable John A. Svahn
Commissioner
Social Security Administration
Baltimore, Maryland 21235

Dear Mr. Svahn:

On June 8, 1983, the Senate Subcommittee on Oversight of Government Management of the Governmental Affairs Committee held a hearing on the current status of Administrative Law Judges (ALJs), in the Social Security Disability Program. At that hearing Louis Hays, the Assistant Commissioner, testified on behalf of the Social Security Administration (SSA). In addition to the information received during that hearing, we are requesting that you answer the questions listed below for the record.

1. In a letter dated May 9, 1983, we requested from you certain pre-hearing information. In our first request we asked that we be provided with "all reports and studies done by SSA on ALJs for the past five years (1979-1983)." In complying with our request your office furnished us with several reports and statistical data. Was the material you provided a complete compilation covering the five-year period? If not, would you provide us with a complete listing of all the reports and a brief description of their contents?

2. We have received from your office a copy of a list of ALJ disposition rates for FY 1982 for the ALJs in Region V. It lists in descending order each ALJ based on the average number of case dispositions. It also lists the "reversal rate" (allowance rate) for each individual ALJ.

    a) Is this document routinely circulated in the Office of Hearings and Appeals and among the ALJs?

    b) Is this information circulated to the public?

    c) Who specifically sees this document?

3. The Office of Hearings and Appeals issues a monthly newsletter to the ALJs in the field. We have been informed that the national reversal rate is routinely published in that letter with an emphasis on any reduction in such rate. What are the purpose and value of publishing the national reversal rate on a monthly basis?

4. When did SSA begin keeping reversal rate and disposition rates on individual ALJs?

5. SSA has repeatedly indicated that it wants to increase the ALJs' case disposition productivity, and Mr. Hays testified at the hearing that it was his personal goal to have ALJ disposition output reach 45 cases per month by the end of this year. In the last 10 years, ALJ productivity has more than tripled. Is there a maximum monthly disposition rate established by SSA as an ultimate dispositional goal?

   a) If there is a maximum monthly disposition goal, what is it?

   b) Do you or Assistant Commissioner Hays feel that there is a disposition productivity level beyond which the quality of an ALJ's decision will diminish? If so what is it?

6. We have been informed that SSA has a "short" form for ALJ decisions.

   a) When is this form used?

   b) How does it differ from the usual decision writing process?

7. In your description of how ALJs are selected for Bellmon Review, it was indicated that for new ALJs all of their allowance decisions are subject to review until they are "satisfactory." What method or statistics do you use to determine when a new ALJ has achieved a "satisfactory" standard?

8. One of the four categories of cases for Bellmon Review is ODO Protest Cases. How are these cases selected for review?

9. Do ALJs know which ALJs are subject to Bellmon Review?

a) How do they know, informally or by formal publication?

b) Is an ALJ officially notified that he/she will be placed on Bellmon Review?

c) How far in advance is notice given and in what form? Please provide a sample document.

10. In Mr. Hays testimony on June 8, 1983, he testified that in the last year 44 judges were taken off Bellmon Review because of improved decisional accuracy, and nine judges were placed on Bellmon Review because of poor decisional accuracy.

a) What was the allowance rate for those 44 judges prior to being placed on Bellmon and just prior to being removed from Bellmon?

b) What was the allowance rate for the nine judges just prior to the time they were placed on Bellmon and what is their current allowance rate?

11. In Mr. Hays' October 4, 1982 memo entitled "Implementation of the Feedback Process in OHA's Ongoing Bellmon Review," he made the following statement:

> "Although the allowance rate is the basis for selection of individual ALJs for that portion of the review, this factor receives no consideration in determining whether to remove ALJs from review."

a) Please explain what is meant by "that portion of the review." Which portion is being referred to?

b) How many ALJs are still being selected for Bellmon Review based on the allowance rate?

c) To the extent that error rate is used to select ALJs for Bellmon Review, please explain how an ALJ's error rate is determined.

12. In the same memo of October 4, 1982, Mr. Hays indicated that it was SSA's intention to begin counselling those judges on Bellmon Review.

a) Would you tell us specifically which judges were on Bellmon at that time?

- b) How many judges were on Bellmon at that time only because of a high allowance rate?
- c) Did SSA have knowledge of the error rate of these judges at that time?
- d) Was SSA capable of determining the error rate of these judges at that time?
- e) Was such a determination made? If not, why not?

13. In the past year you have filed four (4) cases for removal of ALJs before the Merit Systems Protection Board (MSPB). What were the allowance rates of those judges at the time the cases were filed?

14. In his testimony on June 8, 1983, Mr. Hays stated for the record that "ALJ denial decisions are often less defective that ALJ allowance decisions." In arriving at that conclusion, what statistics did SSA use, or what method did SSA use in determining defectiveness?

15. In Mr. Hays testimony on June 8, 1983, in response to a question regarding the decisional accuracy of denial decisions, he indicated that SSA had in its possession documentation that indicated that there is greater decisional accuracy in denial decision than in allowance decisions. Please provide us with that documentation.

16. What was the average disposition time for the Appeals Council on own motion review for FY 1982?

17. We have been informed that a federal district judge in Los Angeles, in the Lopez v. Schweiker case and a judge in the state of Washington have recently granted plaintiffs temporary injuctions preventing their removal from the disability program because of SSA's failure to follow the Patti and Finnegan cases requiring a showing a medical improvement.

    - a) Will SSA choose not to acquiesce to these injunctive decisions?
    - b) Will SSA seek a stay and appeal?

18. Would you please describe the procedure involved in the state disability examination pilot program Mr. Hays mentioned in his testimony.

a) What are the results and conclusions of the program?

b) Would you please furnish us with all reports and supporting material pertaining to the pilot program.

19. Would you please indicate what the current status of the Massachusetts pilot program on Medical Improvement is.

a) When will the pilot program begin?

b) What is the goal of the program?

c) How long will the program be in effect?

Your response should be sent to the Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, SD-326, Washington, D.C. 20510.

Thank you very much for your anticipated cooperation in this matter.

Sincerely,

Bill Cohen
William S. Cohen
Chairman

Carl Levin
Carl Levin
Ranking Minority Member

WSC:CL:ch

1. In a letter dated May 9, 1983, we requested from you certain pre-hearing information. In our first request we asked that we be provided with "all reports and studies done by SSA on ALJs for the past five years (1979-1983)." In complying with our request your office furnished us with several reports and statistical data. Was the material you provided a complete compilation covering the five-year period? If not, would you provide us with a complete listing of all the reports and a brief description of their contents?

The material we provided was not a complete compilation. After discussion with your staff, we furnished only those materials which related to the particular interests and concerns expressed by your staff. The reports not furnished were:

1. Utilization of Vocational Experts, FY 1981--a report prepared on February 1, 1983 which analyzed usage of vocational experts by ALJs in FY 1981 and compared the usage to that in FY 1978 and in FY 1980.
2. Study of Outcomes in Remand Cases--Policy on ALJ assignments in Remanded Cases--a report prepared in OHA on December 15, 1982 which analyzed a sample of cases remanded by the Appeals Council to ALJs to provide a data base for re-evaluation of the OHA policy of remanding cases to the ALJ who initially issued the hearing decision.
3. Utilization of Medical Advisors, FY 1981--a report prepared in OHA on October 7, 1982 which analyzed usage of medical advisors by ALJs in FY 1981 and compared the usage to that in FY's 1977 through 1980.
4. Monitoring the Usage and Performance of Vocational Experts--a report prepared in OHA on July 30, 1982 on a review of training for new ALJs in the usage of vocational experts.
5. Monitoring the Usage and Performance of Vocational Experts--a report dated April 29, 1982 of a study done in OHA to determine whether vocational experts used frequently in the hearings and appeals process provide objective and unbiased testimony and perform satisfactorily as impartial witnesses.
6. Implementation of Section 304(g) of Public Law 96-265, "Social Security Disabilty Amendments of 1980", Report to the Congress By the Secretary of Health and Human Services, January 1982--report on implementing the ongoing review of ALJ decisions required by the Bellmon amendment.
7. Medical Advisor Usage--a report prepared in OHA on February 28, 1979 which analyzed the relationship between ALJ frequency of use of medical advisors in 1977 and the quality, production rate, and cost of ALJ decisions.

2. We have received from your office a copy of a list of ALJ disposition rates for FY 1982 for the ALJs in Region V. It lists in descending order each ALJ based on the average number of case dispositions. It also lists the "reversal rate" (allowance rate) for each individual ALJ.

   a) Is this document routinely circulated in the Office of Hearings and Appeals and among the ALJs?

No. This document, which is considered "administrative confidential", is circulated only to those who have a need to know. Specifically, the document is distributed only to certain central office OHA components--the Office of the Associate Commissioner and his Executive Secretariat, the Office of the Special Counsel to the Associate Commissioner, the Chief Administrative Law Judge, and OHA's Office of Policy and Procedures.

   b) Is this information circulated to the public?

No. However, the document can be obtained through the Freedom of Information Act (FOIA) by anyone who requests it.

   c) Who specifically sees this document?

Those central office components listed in the response to 2.a. have access to this document. Additionally, anyone who requests the document via the FOIA may also receive it.

3. The Office of Hearings and Appeals issues a monthly newsletter to the ALJs in the field. We have been informed that the national reversal rate is routinely published in that letter with an emphasis on any reduction in such rate. What are the purpose and value of publishing the national reversal rates on a monthly basis?

The OHA Newsletter is an informal monthly publication issued to all OHA employees. It is published for informational purposes only, and does not alter or supersede regulations, implementing instructions or operating procedures. Various statistics about OHA are regularly published in the newsletter, including monthly receipts, dispositions, pending caseloads and ALJ allowance rates. While month-to-month changes in all statistics, including the ALJ allowance rates, have been noted, there has never been an emphasis placed on reducing allowance rates.

4. When did SSA begin keeping reversal rate and disposition rates on individual ALJs?

SSA has kept records on reversal and disposition rates by individual ALJs since 1973. Prior to that time and going back to the mid-sixties or earlier, individual ALJs compiled and reported monthly on dispositions by categories of allowances, denials and dismissals.

5. SSA has repeatedly indicated that it wants to increase the ALJs' case disposition productivity, and Mr. Hays testified at the hearing that it was his personal goal to have ALJ disposition output reach 45 cases per month by the end of this year. In the last 10 years, ALJ productivity has more than tripled. Is there a maximum monthly disposition rate established by SSA as an ultimate dispositional goal?

The average case disposition per ALJ per month has increased from 14 in fiscal year 1973 to 34 in fiscal year 1982--a 143 percent increase. During this time, substantial additional resources have been provided to the ALJs which account for much of this increase. The staff support ratio increased from 2.2 to 1 in FY 1973 to 4.7 to 1 in FY 1982. In addition, word processing equipment, dictating machines and a standardized text guide have assisted ALJs in increasing their production. SSA has never established a maximum monthly disposition rate as an ultimate dispositional goal.

a) If there is a maximum monthly dispositional goal, what is it?

As stated above, SSA does not have a maximum monthly dispositional goal for its ALJs. Our goals are (1) to provide accurate and timely decisions on claims for benefits, and (2) to insure that all employees work to the full extent of their capabilities.

b) Do you or Assistant Commissioner Hays feel that there is a disposition productivity level beyond which the quality of an ALJ's decision will diminish? If so what is it?

Under the current structure of OHA, including the additional resources we are making available to the ALJs, we believe that a national average disposition rate of 45 cases per ALJ per month is optimal. We realize that, due to individual differences in organization, motivation and other factors, some ALJs will be able to produce more than 45 cases per month without suffering a loss of quality in their decisions. On the other hand other ALJs, despite working to their full capabilities, may not be able to average 45 case dispositions per month.

6. We have been informed that SSA has a "short" form for ALJ decisions.

   a) When is this form used?

OHA does not presently use a short form hearing decision. A short form was available for use from November 1971 through December 1981 as an optional procedure for writing decisions which were fully favorable to the claimant.

   b) How does it differ from the usual decision writing process?

The ALJs were required to evaluate claims in the same manner as usual. The only difference was in the format of the decision itself. The short form decision provided fill-in spaces for the date of the claimant's application for benefits, the date which the ALJ found the claimant disabled and the date benefits were to commence. Rather than summarizing and evaluating the evidence within the body of the decision itself, the ALJ issued an accompanying "memorandum for the file" which explained his or her logic in arriving at the favorable conclusion and provided references to supporting documentary evidence. The short form decisional format was eliminated to insure that a complete rationale be included in every decision, whether favorable or unfavorable. It also reduced any potential bias which may have existed for ALJs to increase decisional output by issuing short form decisions without adequately documenting the evidence of record.

7. In your description of how ALJs are selected for Bellmon Review, it was indicated that for new ALJs all of their allowance decisions are subject to review until they are "satisfactory." What method or statistics do you use to determine when a new ALJ has achieved a "satisfactory" standard?

All allowance decisions of newly hired ALJs are reviewed for at least 6 months. The ALJ will be removed from review once his or her own-motion rate is roughly equal to or lower than the average own-motion rate as determined by the national random sample portion of the Bellmon review. An ALJ's own-motion rate is the percentage of his or her decisions over which the Appeals Council takes jurisdiction and either reverses the decision or remands it to the ALJ for further proceedings.

8. One of the four categories of cases for Bellmon Review is ODO Protest Cases. How are these cases selected for review?

All favorable ALJ title II disability decisions are forwarded from the hearing office to the Office of Disability Operations (ODO) for processing of the payment award. ODO disability examiners review a sample of all ALJ allowance decisions. If the examiner believes that the ALJ's decision is not supported by substantial evidence or contains an error of law, the case is referred to the Appeals Council. In FY 1982, 68 cases were referred to the Appeals Council, 57 of which were reviewed under the Council's own-motion authority.

9. Do ALJs know which ALJs are subject to Bellmon Review?

   a) How do they know, informally or by formal publication?

ALJs selected for the individual portion of the Bellmon review are advised in writing by the Chief Administrative Law Judge (CALJ). Copies of the notification are sent to the Administrative Law Judge in Charge (ALJIC) of their hearing office and to their Regional Chief Administrative Law Judge (RCALJ).

The names of ALJs selected for Bellmon review are not published by OHA. The ALJs are informed that every ALJ is subject to the random sample portion of the Bellmon review and that all new ALJs are placed on review for a minimum of 6 months.

   b) Is an ALJ officially notified that he/she will be placed on Bellmon Review?

Yes. Each ALJ placed on Bellmon review is officially notified by a memorandum signed by the CALJ with copies of the memorandum sent to their ALJIC and RCALJ.

   c) How far in advance is notice given and in what form? Please provide a sample document.

The memorandum to the ALJ is effective upon receipt. Attached is a sample of the notice.

[illegible] Attachment to Question 9

MAR 2 4 1983

Chief Administrative Law Judge

Ongoing Review by Section 304(g) of P.L. 96-265

Administrative Law Judge

PURPOSE

This is to advise you that your decisions are to be included in the individual ALJ portion of the own motion review of hearing decisions conducted as a result of the Social Security Amendments of 1980 ("Bellmon Amendment").

As you know, part of this review is a national random sample of all Administrative Law Judges' allowance decisions. As a result of random sample reviews, we have identified a number of ALJs whose own motion rates exceed the national average. We have decided to place ALJs on individual review who have had at least 12 decisions reviewed with own motion action taken in at least 25% of these cases. In this regard we have reviewed 19 of your allowance decisions. Of these, own motion action was taken by the Appeals Council in 8 cases (42%). This compares with the National Random Sample own motion rate of 10.9%.

Because of the limited number of your cases reviewed in this sample, we want to review all of your allowance decisions for approximately three months. The results of this intensive review will be a more valid indicator of your ongoing own motion rate. If a high own motion rate continues, you will remain under review; if the rate declines to a level approximating the National Random Sample rate, you will be removed from review. I wish to emphasize that the decisions to select an ALJ for review and to either continue or discontinue the review are made entirely without regard to allowance rates.

Effective immediately and until further notice, please route all of your allowance decisions involving title II and concurrent disability issues to Central Office.

The following instructions should be followed by your staff in releasing all your favorable title II and concurrent cases involving the issue of disability. These instructions apply only to disability issue reversal cases. If disability was not at issue in the hearing decision, for example, if workmen's compensation offset or entitlement of a dependent child whose entitlement was not contingent on his/her being disabled, etc., was the issue in the decision, that case should not be referred to OHA.

INSTRUCTIONS

1. Partially and fully favorable title II and concurrent disability issue cases are to be processed in the normal manner through the issuance and mailing of the hearing decision.

2. The case control instructions outlined in the OHA Case Control System Manual for the posting of the HA-670 control card and the SSA-672 coding sheet will be followed in these cases; enter location code 5950 in "CLT" on both the control card and the coding sheet on the 335 action. Location code 5950 will flag the Case Control System that the case has been selected for Bellmon review. (Note: In some concurrent cases, a reversal decision may be issued on only one part. Follow the above instruction for both parts.) All cases referred to Central Office for this review, must include the appropriate copies of the HA-670 control card in the claim file(s).

3. Hearing cassettes are to remain with the claim folder in the cassette envelope for all cases referred to Central Office for this review. The cassette(s) are to be placed in the title II folder in concurrent cases. (AISARS procedures will not apply in these instances.) The cassette(s) must be sent with the claim file.

4. Routing of title II only cases: A form HA-5051 is to be stapled to the outside of the claim folder directing it to its normal effectuating component. On top of this route slip (HA-5051) to the effectuating component, staple a form HA-505 directing the claim folder to OHA, P.O. Box 1207, Arlington, VA 22210.

5. Routing of concurrent cases: The two claim folders are to be split and set-up for release in the normal manner, with appropriate photocopies placed in the SSI folder. Prepare a form HA-5051 for each folder, directing it to the proper effectuating component, and staple it to that folder. Use rubber bands to keep both the title II and SSI folders together with the title II folder on top for sending to CO. Please do not staple them. Prepare a route slip, form HA-505, directing the combined files to OHA, P.O. Box 1207, Arlington, VA 22210, and staple it to the top of the HA-5051 to the effectuating component on the title II file. Release the files together as indicated above to Central Office. Further routing to the appropriate effectuating components will be done, based on your pre-prepared HA-5051 route slips.

6. All applicable cases must be forwarded immediately upon release of the decision. If several decisions are released at the same time, then those cases may be grouped for mailing on the same day.

7. Post decision correspondence is to be handled in accordance with present instructions.

I appreciate your cooperation in this matter. If you have any questions regarding these instructions, please contact Margie David at FTS 235-1814.

Philip T. Brown

Attachment

cc:
ALJIC
RCALJ
OPA

bcc:
Chief, Statistics and Reports Branch

10. In Mr. Hays testimony on June 8, 1983, he testified that in the last year 44 judges were taken off Bellmon Review because of improved decisional accuracy, and nine judges were placed on Bellmon Review because of poor decisional accuracy.

a) What was the allowance rate for those 44 judges prior to being placed on Bellmon and just prior to being removed from Bellmon?

There were actually 46 ALJs taken off Bellmon review last year because of improved decisional accuracy:

	ALLOWANCE RATE PRIOR TO BELLMON	ALLOWANCE RATE PRIOR TO REMOVAL1/	OM2/ RESULTS BEFORE REMOVAL	REMOVAL DATE
1.	83.00	75.42	8.60	6/07/82
2.	76.70	68.96	37.50 3/	1/08/82
3.	75.50	54.26	5.30	6/07/83
4.	76.90	75.70	10.00 3/	12/31/82
5.	87.80	100.00	6.00	3/11/83
6.	74.40	62.55	9.30	6/07/83
7.	77.40	41.70	4.90	2/02/83
8.	77.10	60.41	5.70	6/07/83
9.	71.60	53.24	9.50	2/02/83
10.	76.80	69.06	7.50	6/07/83
11.	60.10	57.89	10.30	4/15/82
12.	80.80	63.50	9.00	2/02/83
13.	81.80	52.88	7.30	2/02/83
14.	80.60	73.72	10.50	4/15/82
15.	83.50	65.41	6.40	2/02/83
16.	77.60	70.88	8.30	4/15/82
17.	43.20	42.86	9.70	4/15/82
18.	55.30	55.06	6.80	2/04/83
19.	65.40	51.72	2.90	2/04/83
20.	73.30	60.69	8.50	2/02/83
21.	44.40	54.60	8.00	2/11/83

1/ Allowance rates prior to removal were computed based on the available data for the two fiscal quarters immediately before the removal. These rates were computed on July 11 specifically in response to this inquiry and were not considered in deciding whether to remove the ALJs from review.

2/ An ALJ's own-motion (OM) rate is the percentage of his or her decisions over which the Appeals Council takes jurisdiction and either reverses the decision or remands it to the ALJ for further proceedings.

3/ Removal from review was based on retirement or death, not on the ALJ's own-motion rate.

	ALLOWANCE RATE PRIOR TO BELLMON	ALLOWANCE RATE PRIOR TO REMOVAL	OM RESULTS BEFORE REMOVAL	REMOVAL DATE
22.	74.40	64.00	12.20	4/15/82
23.	72.20	63.27	6.60	2/11/83
24.	37.50	33.56	0	4/15/82
25.	76.10	63.09	5.40	2/02/83
26.	76.70	70.13	7.70	6/07/83
27.	76.70	77.78	6.70	6/07/83
28.	74.10	64.53	8.10	2/02/83
29.	74.80	61.68	66.70 3/	10/02/82
30.	75.70	25.18	0	3/11/83
31.	71.00	64.06	1.33	3/11/83
32.	77.00	55.70	2.40	6/07/83
33.	73.00	67.82	0	3/11/83
34.	71.00	73.84	6.67	3/11/83
35.	79.00	59.01	7.69	3/11/83
36.	73.00	69.61	0	3/11/83
37.	74.00	56.04	4.35	3/11/83
38.	74.00	73.79	2.70	3/11/83
39.	74.00	68.21	2.78	3/11/83
40.	71.00	63.35	5.41	6/07/83
41.	49.70	37.38	8.30	6/07/83
42.	59.70	57.20	5.00	6/07/83
43.	32.37	46.07	2.44	3/11/83
44.	70.05	54.78	6.06	3/11/83
45.	82.40	76.00	23.50 3/	3/31/83
46.	82.80	67.15	27.90 3/	5/01/83

b) What was the allowance rate for the nine judges just prior to the time they were placed on Bellmon and what is their current allowance rate?

	Allowance Rate Prior To Bellmon*	Own-Motion Rate When Recommended For Addition	Current Allowance Rate (May 1983)
1.	59	37	61
2.	52	67	44
3.	44	29	36
4.	45	29	37
5.	57	42	48
6.	52	38	39
7.	53	31	50
8.	57	33	44
9.	56	25	53

*Allowance rates are based on results for the last quarter of fiscal year 1982, and the first quarter of fiscal year 1983. These rates were computed in response to the above request and were not considered in deciding whether to place the ALJs on review.

11. In Mr. Hays' October 4, 1982 memo entitled "Implementation of the Feedback Process in OHA's Ongoing Bellmon Review," he made the following statement:

"Although the allowance rate is the basis for selection of individual ALJs for that portion of the review, this factor receives no consideration in determining whether to remove ALJs from review."

a) Please explain what is meant by "that portion of the review." Which portion is being referred to?

OHA presently has four separate categories of review under the Bellmon program. The first is a national random sample of allowance cases. The second is a review of the allowance decisions of all new ALJs. The third is a sample of allowance decisions initially screened by disability examiners in SSA's Office of Disability Operations. The last is a review of allowance decisions of ALJs who have been individually selected due initially to high allowance rates and, since December 1982, due to high own-motion rates. In the October 4, 1982 memorandum, Mr. Hays was referring to that portion of the Bellmon review involving individually selected ALJs.

b) How many ALJs are still being selected for Bellmon Review based on the allowance rate?

None. SSA no longer uses individual ALJ allowance rates in selecting ALJ cases for review. Since December 1982, individual ALJs are placed on review solely on the basis of the quality and accuracy of their decisions as reflected by their own-motion rates.

c) To the extent that error rate is used to select ALJs for Bellmon Review, please explain how an ALJ's error rate is determined.

As noted in the response to 11.a., one category of review under the Bellmon program involves a national random sample of allowance decisions for all ALJs. ALJs are presently selected for the individual portion of Bellmon review based on high (as compared to the national average) own-motion (error) rates as taken from the national random sample. The own-motion rate refers to the percentage of an ALJ's decisions over which the Appeals Council takes jurisdiction and either reverses the decision or remands it back to the ALJ for further proceedings.

SSA has also placed under review those ALJs with the highest grant review rates in denial decisions. The grant review rate refers to the percentage of an ALJ's denial decisions or dismissal orders over which the Appeals Council takes jurisdiction and either reverses the decision or remands it back to the ALJ for further proceedings. However, unlike the own-motion rate, a portion of these actions may result from the claimant's submission of new and additional evidence and therefore may not reflect ALJ error.

12. In the same memo of October 4, 1982, Mr. Hays indicated that it was SSA's intention to begin counselling those judges on Bellmon Review.

    a) Would you tell us specifically which judges were on Bellmon at that time?

    Following is a list of the ALJs who were on Bellmon review. We request that this list not be included in the committee's published record of the hearing.*

*Information retained in Subcommittee files.

    b) How many judges were on Bellmon at that time only because of a high allowance rate?

The Bellmon review program, which started on October 1, 1981, was initially limited to approximately 7½ percent of all title II and title II/XVI concurrent disability allowance decisions issued by hearing offices and individual ALJs selected on the basis of allowance rates of 70 percent or higher, and 74 percent or higher, respectively. On April 1, 1982 the case-selection criteria for the program were redesigned. One change at that time was to remove entire hearing offices from review. Of the 113 ALJs who were on Bellmon review as of October 4, 1982, 105 had been placed on review because of high individual allowance rates. The eight remaining ALJs were originally included on review because they came from hearing offices with high allowance rates, although their individual allowance rates were not high. Those eight ALJs had not been removed from review as of October 4, 1982, either because their own-motion review rates were found to be high or because a sufficient number of their cases had not been reviewed to make a determination on whether they should be removed.

    c) Did SSA have knowledge of the error rate of these judges at that time.

OHA began keeping data on the own-motion (error) rates of ALJs from the start of the Bellmon review program on October 1, 1981. As of October 4, 1982, six ALJs had been removed from Bellmon review due to their low own-motion rates. At that time, OHA had reviewed a relatively small sample of decisions of many of the

ALJs remaining on review. Therefore, a decision as to whether to continue these ALJs on review was postponed pending review of more of their decisions.

d) Was SSA capable of determining the error rate of these judges at that time?

Please see answer to Question 12.c.

e) Was such a determination made? If not, why not?

Please see answer to Question 12.c.

13. In the past year you have filed four (4) cases for removal of ALJs before the Merit Systems Protection Board (MSPB). What were the allowance rates of those judges at the time the cases were filed?

SSA has not filed in 1983 any complaints with the Merit Systems Protection Board (MSPB) seeking the removal of an ALJ. In 1982, SSA filed six complaints with the MSPB requesting that the Board find "good cause" to remove the ALJs. The allowance rates shown on the chart represent the average allowance rates for the two calendar quarters immediately preceeding the quarter in which the complaint was filed.

Three of the six ALJs * were charged with inefficiency due to their unacceptably low productivity. The other three were charged with serious behavioral violations * ; or a combination of behavioral violations and inefficiency *

The allowance rates for these ALJs were obtained for purposes of responding to this question. Their allowance rates were not reviewed at the time the decision to file complaints was made and were totally irrelevant to the filing of the complaints and the substance of the complaints.

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*Information retained in Subcommittee files.

14. In his testimony on June 8, 1983, Mr. Hays stated for the record that "ALJ denial decisions are often less defective than ALJ allowance decisions." In arriving at that conclusion, what statistics did SSA use, or what method did SSA use in determining defectiveness?

In FY 1982, the Appeals Council reviewed approximately 65,000 ALJ denial decisions from claimant-initiated appeals and 12,000 ALJ allowance decisions under its own-motion (Bellmon) authority. The criteria applied by the Appeals Council in determining whether to review a case are contained in the regulations and apply equally to both claimant-initated appeals and cases reviewed under own-motion authority. The Appeals Council will review a case if (1) there appears to be an abuse of discretion by the ALJ; (2) there is an error of law; (3) the ALJ's action, findings or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue that may effect the general public interest. Thus, the rate at which the Appeals Council granted review under each of the two types of cases is an indication of the errors or defects contained in those cases. The Council granted review in 10.8 percent of the claimant-initiated appeals of denial decisions and 18.1 percent of the cases reviewed under its own-motion authority.

It should be noted that the 10.8 percent rate for denial decisions is somewhat inflated since the decision to review a denial is frequently based on consideration of new evidence submitted by the claimant rather than on defects in the ALJ's decision. On the other hand, additional evidence is not a factor when the Council decides to review a decision on its own motion, since few claimants submit additional evidence after receiving a favorable decision from the ALJ.

15. In Mr. Hays testimony on June 8, 1983, in response to a question regarding the decisional accuracy of denial decisions, he indicated that SSA had in its possession documentation that indicated that there is greater decisional accuracy in denial decision than in allowance decisions. Please provide us with that documentation.

In addition to the statistics referred to in the response to question 14, the documentation is contained in the Bellmon study report submitted to Congress in January 1982. Copies of pages 22 and 23 of that report are attached. The study results showed that there was a significantly higher percentage of incorrect decisions in the high ALJ allowance rate group than in the medium or low-allowance rate groups.

Attachment to Question 15

Table 5. Appeals Council Allowance Rate for ALJ Groups with Low, Medium, and High Allowance Characteristics (Appeals Council Subsample)

ALJ Allowance Rate Group	Original ALJ Decision on Sample Cases		Appeals Council Allowances		
			Percent of ALJ Decisions Allowed		Appeals Council Allowance Rate
	(1)	X	(2)	=	(3)
Low Allowance Rate Group					
Allow	50%		70%		35%
Deny	50		24		12
Total					47
Medium Allowance Rate Group					
Allow	65		68		44
Deny	35		19		7
Total					51
High Allowance Rate Group					
Allow	81		52		43
Deny	19		17		3
Total					46
Total, All ALJs					
Allow	64		63		40
Deny	36		21		8
Total					48

Table 5 shows that the Appeals Council allowed roughly 50 percent (ranging from 46-51 percent) of the cases from each of the three groups of ALJs. This relatively consistent Appeals Council allowance rate across the groups does not follow the pattern of high, medium, and low allowance rates that characterize the groups, and suggests that there are not major variations in the characteristics of cases decided by each group. The Appeals Council allowance rates for cases that the low and medium allowance rate ALJs originally allowed were consistent: 70 and 68 percent, respectively. However, the Appeals Council allowance rate for cases originally allowed by ALJs with high allowance rates dropped to 52 percent.

If the Appeals Council decision is taken as the "correct" decision under the standards and procedures governing ALJs, these findings would indicate that decisions to allow cases by ALJs with high allowance rates are more often "incorrect" than the decisions of ALJs with medium and low allowance rates. By the same token, no significant difference is found in Appeals Council decisions on cases originally decided by the ALJ groups with medium and low allowance rates. These two groups appear to be relatively homogeneous, using Appeals Council decisions as the criterion. This clearly suggests that the ongoing, own-motion review mandated by P.L. 96-265 should place the most emphasis on a review of cases decided by ALJs with high allowance rates.

The initial review also indicates that a more subtle form of inconsistency, or subjectivity, exists in disability decisions. Its essence is that while two different decisionmakers or sets of decisionmakers may often make the same decision to allow or deny a particular case, their reasons for making that decision and their view of the evidence on which the decision is based may be quite different. When the Appeals Council reviewed the ALJ decisions in the initial review, they allowed 63 percent of the cases which the ALJs allowed and denied 79 percent of the cases which the ALJs denied (see Table 2). A detailed examination of the cases on which both groups agreed, however, shows that the Council agreed with the ALJs as to the basis for an allowance or denial much less frequently than it agreed on whether the case should be allowed or denied. The Council agreed that a case should be allowed because the claimant met or equaled the Medical Listings in 41 percent of the cases that the ALJs allowed on this basis, and agreed with an ALJ allowance based on vocational rules in 38 percent of the cases. The rate of agreement on the basis for allowance due to all other allowance criteria was significantly lower. The same phenomenon is observed, although to a lesser degree, in those cases which both the ALJ and the Appeals Council denied.

In short, although there was a fair amount of agreement as to whether a case should be allowed or denied according to the standards governing ALJs, there was significantly less agreement on the basis for reaching that decision. It seems obvious that when these kinds of variations occur in decisions on cases in which the decisionmakers agree upon the outcome, there is a considerable degree of latitude for the individual judgments of different decisionmakers to produce a different outcome on the same case. Although it may be possible by various means to lessen inconsistency in the determination process, one cannot necessarily expect that two different decisionmakers or decisionmaking levels operating under the same rules and procedures will uniformly produce the same decision results on the same cases.

16. What was the average disposition time for the Appeals Council on own motion review for FY 1982?

We do not have statistics on the average disposition time for cases reviewed under own-motion authority.

Under the regulations, the Appeals Council must exercise its own motion authority within 60 days of the ALJ's decision. We estimate that about half of the own motion actions by the Appeals Council are remands, and in those instances the case is remanded at the same time that own motion is taken.

When the Council decides to review on its own motion and proposes to either reverse the ALJ's allowance decision or issue a less favorable decision, the claimant is provided a notice which explains the basis for review and the proposed decision. The claimant is given the opportunity to submit additional evidence and written argument and may be given the right to appear for oral argument. Extensions of time are often requested and granted. After the evidence/argument has been submitted or the time for submission has expired, the Council proceeds with its decision. The decision is then generally issued within 30-45 days.

17. We have been informed that a federal district judge in Los Angeles, in the Lopez v. Schweiker case and a judge in the state of Washington have recently granted plaintiffs temporary injunctions preventing their removal from the disability program because of SSA's failure to follow the Patti and Finnegan cases requiring a showing a medical improvement.

(a) Will SSA choose not to acquiesce to these injunctive decisions?

(b) Will SSA seek a stay and appeal?

We have filed with the District Court for the Western District of Washington a request for a stay of its order in Morrison et al. v. Heckler and have recommended to the Justice Department that a stay of the Lopez decision be sought. The Department of Health and Human Services is currently considering whether to recommend that the Department of Justice appeal Morrison or Lopez.

18. Would you please describe the procedure involved in the state disability examination pilot program Mr. Hays mentioned in his testimony.

a) What are the results and conclusions of the program?

Earlier this year, SSA conducted a pilot test of the reconsideration level disability hearings process mandated by P.L. 97-455. Three hearing units were operating during the pilot in the following locations: Dallas, Texas; Albuquerque, New Mexico; and Oakland, California. All claimants requesting a reconsideration of a cessation determination at the participating district offices were included in the 2-month project. About 1,000 cases were reviewed under the pilot.

In testing the process, we used a cooperative State/Federal approach. We primarily used existing State procedures and resources for reconsideration development. The State DDSs developed the case for hearing and allowed claims where appropriate, while Federally supervised hearing units conducted the hearings. Claimants were given the opportunity to explain why they believed that they continued to be disabled and how their impairment prevented them from working. The claimants had the right to be represented and to call witnesses. Claimants were asked to comment on the evidence in their file and to offer any of their own interpretations or reservations about that evidence. The hearing officer asked an extensive series of questions designed to elicit the claimant's description and discussion of all factors which might potentially effect the disability evaluation process.

The hearing officer prepared a written decision based on the evidence presented at the hearing as well as evidence already in the file. The written decisions were generally prepared within 1 day of the hearing and forwarded to the claimant after passing a quality assessment review. Whenever a claimant raised issues in the hearing that were not fully addressed in the medical and vocational file documents, the case was sent back to the DDS for additional development before a decision was issued. Claimants were informed throughout the process that participation in the reconsideration level hearing in no way affected their right to appeal their case to an ALJ.

During the project the DDSs reversed the initial cessation determination while developing the cases for hearing in 18 percent of the cases. Hearing officers reversed the cessation decision in

24 percent of the cases that were forwarded to them by the DDS for a reconsideration hearing. The overall reconsideration level allowance rate during the pilot was 38 percent.

b) Would you please furnish us with all reports and supporting material pertaining to the pilot program.

A detailed report of the pilot procedures, results and conclusions is now being prepared and will become available within a month. A copy will be sent to you at that time.

19. Would you please indicate what the current status of the Massachusetts pilot program on Medical Improvement is.

a) When will the pilot program begin?

We have been unable to come to an agreement with Massachusetts on a pilot program, and so have no plans to start a pilot at this time.

b) What is the goal of the program?

See response to (a) above.

c) How long will the program be in effect?

See response to (a) above.

SUBCOMMITTEE

LISTING OF

SSA REPORTS AND MEMORANDA MONITORING

ALJ DECISIONS

April 7, 1981 -- Processing Time Profile for ALJs

May 26, 1981 -- Study of Effect of Staff Attorney Support on ALJ Decisional Quality

October 30, 1981 -- DARE Study of Allowance Decisions

December 29, 1981 -- Characteristics of Ideal Hearing Office

June 29, 1982 -- Report on Individual ALJ Reversal Rates

July 9, 1982 -- Report on ALJ Compliance with New CDI Policy

September 15, 1982-- Report on Disability Allowance Rates

September 27, 1982-- Report on ALJ Compliance with New CDI Policy

November 12, 1982 -- Report on ALJ Compliance with New CDI Policy

January 17, 1983 -- Follow Up Review of Selected Allowance Decisions

February 4, 1983 -- OHA Study Text

April 20, 1983 -- Quality Review/Bellmon Report

Monthly Executive Summary of Report on Bellmon Review Activities

(MERIT SYSTEMS PROTECTION BOARD DATA)

ACTIONS AGAINST ADMINISTRATIVE LAW JUDGES 1946-1983[1]

CITATION OR DOCKET NUMBER	EMPLOYING AGENCY	BASIS OF ACTION	DISPOSITION	DATE OF FINAL DECISION
Civil Service Commn. No. 1	Interstate Commerce Commission	Misconduct	30-day suspension	10/18/61
CSC No. 2 [2]	Social Security Administration, HEW	Financial Irresponsibility	Removal	03/19/62
CSC No. 3	Bureau of Land Mgt., Dept. of Interior	Misconduct	30-day suspension	10/21/64
CSC No. 4	Interstate Commerce Commission	Misconduct	Removal	05/18/72
CSC No. 7	National Transportation Safety Board	Misconduct	20-day suspension & Loss of Status as Chief	03/13/78
CSC No. 5	Social Security Administration, HHS	Misconduct	Dismissed by Consent	01/15/79

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[1] Enacted in 1946, the Administrative Procedure Act provided for the appointment of hearing examiners; title later changed to administrative law judge. Currently, see 5 U.S.C. § 3105.

[2] Subsequent disposition upheld the removal.

CITATION OR DOCKET NUMBER	EMPLOYING AGENCY	BASIS OF ACTION	DISPOSITION	DATE OF FINAL DECISION
Civil Service Comm. No. 9 3/	Social Security Administration, HHS	Misconduct	30-day Suspension	06/12/79
CSC No. 10	Social Security Administration, HHS	Misconduct	60-day Suspension	06/12/79
CSC No. 11 4/	Social Security Administration, HHS	Involuntary Retirement	Disability retirement pursuant to settlement	08/06/80
1 MSPB 5/ 128	Social Security Administration, HHS	Unsatisfactory Performance	Dismissed upon parties' joint request	10/22/79
2 MSPB 20, aff'g 2 MSPB 23 6/	Social Security Administration, HHS	Misconduct	Removal	03/20/80

3/ United States District Court of the District of South Carolina upheld the suspension by granting the defendent's (MSPB's) motion for summary judgement.

4/ Another case presented to the Civil Service Commission was an involuntary retirement action requested by the agency on account of disability. The Commission approved the retirement without holding a hearing. The Court of Claims reversed, holding that the ALJ was entitled to a hearing.

5/ The citation "MSPB" refers to the published reports of MSPB decisions.

6/ The Board's decision removing the administrative law judge was upheld

CITATION OR DOCKET NUMBER	EMPLOYING AGENCY	BASIS OF ACTION	DISPOSITION	DATE OF FINAL DECISION
MSPB No. HQ75218110056	Social Security Administration, HHS	Voluntary retirement which appl. attempted to rescind after the effective date	Board dismissed appeal for lack of jurisdiction	11/16/81
MSPB No. HQ75218210048	Federal Labor Relation Authority	Reduction-in-Force (11 ALJ's)	Withdrawal of appeal after two-day hearing	09/03/82
MSPB No. HQ75218210009	Social Security Administration, HHS	Misconduct	30-day suspension (recommended decision 12/02/82); final dec. not yet issued	Pending
MSPB No. NY03518210297	Occupational Safety and Health Administration	Reduction-in-Force	Dismissed without prejudice upon request of appellant	12/08/82
MSPB No. HQ75218210052	Social Security Administration, HHS	Misconduct	30-day suspension (recommended decision 01/25/83); final dec. not yet issued	Pending
MSPB No. DC03518211279	Interstate Commerce Commission	Reduction-in-Force	Dismissed upon appellant's request	03/04/83
MSPB No. HQ75218210015	Social Security Administration, HHS	Unsatisfactory Performance	Removal from position of ALJ (recommended decision 04/06/83); final dec. not yet issue	Pending
MSPB No. HQ75218210013	Social Security Administration, HHS	Unsatisfactory Performance	Agency withdrew charges; ALJ retired	04/08/83
MSPB No. HQ75218210026	Social Security Administration, HHS	Misconduct	Removal (recommended decision 04/19/83) final decision not yet issued by the Bd	Pending
MSPB No. DC03518211267	Interstate Commerce Commission	Reduction-in-Force	Agency action sustained (recommended decision 04/25/83); final dec. not yet issued	Pending

CITATION OR DOCKET NUMBER	EMPLOYING AGENCY	BASIS OF ACTION	DISPOSITION	DATE OF FINAL DECISION
MSPB No. HQ75218210025	Social Security Administration, HHS	Misconduct	120-day suspension (recommended decision 05/06/83); final dec. not yet issued	Pending
MSPB No. HQ752182100014	Social Security Administration, HHS	Unsatisfactory Performance	---------	Pending
MSPB No. HQ75218210010	Social Security Administration, HHS	Misconduct & Unsatisfactory Performance	---------	Pending
MSPB No. HQ75218210008	Social Security Administration, HHS	Misconduct	---------	Pending

STATEMENT OF POSITION OF THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE TO THE SENATE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

I. INTRODUCTION

The Federal Administrative Law Judges Conference (FALJC) strongly opposes the attempts by the Department of Health and Human Services, Social Security Administration (SSA) to impose improper production quotas upon Administrative Law Judges (ALJs) assigned to that agency.

FALJC is the sole professional organization representing ALJ's government-wide. The organization was established in 1947, and has grown together with the administrative process. Its membership now numbers over 700 ALJ's and represents virtually every federal administrative agency.

The issue of production quotas imposed upon Administrative Law Judges who serve in adversarial proceedings as the federal administrative judiciary is of grave concern to every ALJ. It should bear similar Congressional import.

As we shall show, Congress has consistently and resolutely turned back the kind of agency control of ALJs that prevails today within SSA. Congress has done so expressly in order to preserve ALJ independence as a trier of fact and decider of law. That independence is essential to the perception by the public and litigating parties that the administrative process is scrupulously fair. ALJ independence also is essential to reviewing courts' acceptance of, and respect for, ALJ decisions.

A blind and arbitrary performance standard exists at SSA. It does no more than count the number of decisions issued, fostering a race to pile up quantity. No such numerical standard can take into account differences in judicial style, among case loads, complexity of issues, length of hearings, quality of support staffs, and zeal of the litigants.

The harmful effects of such standards on the quality and fairness of decisions are not speculative. Haste to rush hearings to a conclusion inevitably affects due process. When speed becomes an overriding consideration there is bound to be a diminution in fairness, and careful sifting of evidence, and a cursory analysis of law. Cases of first impression are decided without establishing the necessary doctrinal foundation for a newly emerging principle. Settlements, which consume ALJs' time to achieve the desirable end of amicable resolution, are cast aside.

II. BACKGROUND

The more than 1100 federal administrative law judges (ALJs) who serve today 1/ hear and decide cases in which the matters in dispute "permeate every sphere and almost every activity of our national life /and/ have a profound effect upon direction and pace of our economic growth." 2/ The history of the institution demonstrates Congress' concern for and decision to preserve ALJs' independence from influences --especially agency influences -- that might in any way reduce that independence.

Independence of federal ALJs (then called hearing examiners) was one of the major reforms embodied in the Administrative Procedure Act (APA), enacted in 1946. Congress took as its mission the assurance of fairness in the full range of administrative action affecting the public. It was especially concerned with the trial type hearing (which came to be governed by Sections 5, 6, 7 and 8 of the 1946 APA). It recognized the need to allay "/public/ suspicions . . . that the submittals of private parties are not fully considered, that the views of agency personnel are emphasized without opportunity for private parties to meet them, and that matters outside the record are often the real grounds for decision." 3/

The Congress had before it a system in which administrative trials were held before agency employees, subject to agency control respecting classification, pay, promotion and tenure. "/T/here were no reliable safeguards to ensure the objectivity and judicial capability of presiding officers . . . /T/he power of the agencies to control and influence personnel made questionable the contention of any agency that its proceedings assured fundamental fairness." 4/ Then, as today, there was no statutory professional corps of ALJ's. Agencies could then assign employees to preside over a trial one day, administer a program the next.

The solution was Section 11 of the 1946 APA, 5/ which established a corps of ALJs whose duties were exclusively to preside at trial type hearings, whose compensation was outside of agency control (specifically, under the Civil Service Commission, now OPM who were subject to removal only for good cause, and then only after a hearing subject to judicial review -- a procedural right then and now unique for federal civil servants serving under Article II of the Constitution. 6/ The statutory provisions drew upon the more ancient wisdom grounded in history and contained in Article III, which safeguards federal judicial independence through still more stringent compensation and tenure provisions. Just as the independent judiciary was structurally insulated from the other governmental branches to provide a safe haven for individual liberties in times of crisis, so Congress intended ALJs to act as a bulwark for administrative litigants, as "a critical check on potentially excessive or unauthorized regulation." 7/

111. JUDICIAL PRECEDENT SUPPORTS THE CONCEPT OF ADMINISTRATIVE LAW JUDGE INDEPENDENCE

In one decision after another the courts have reemphasized the independence from agency authority that ALJs must enjoy in order to carry out Congress' will and their high calling. The Supreme Court recognized this first in Ramspeck v. Federal Trial Examiners Conference, 8/ 345 U.S. 128 (1953). The court's majority quoted the legislative history of the APA for Congress' intention "to make /ALJs/'a special class of semi-independent subordinate hearing officers'," *id.* at 132. It noted that "Congress intended to provide tenure" for ALJs, and that "/T/hey were not to be paid, promoted or discharged at the whim or caprice of the agency . . ." Id. at 142. Under the APA, ALJs were no longer to be "mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." *Id.* at 131. Justices Black, Frankfurter and Douglas, dissenting, in a passage the majority did not challenge, thus characterized Congress' intent: "/T/he Administrative Procedure Act was designed to give trial examiners (now ALJs) in the various administrative agencies a new status of freedom from agency control. Henceforth, they were to be 'very nearly the equivalent of judges even though operating within the Federal system of administrative justice'."

A few years later, the District Court in *Borg-Johnson Electronics, Inc. v. Christenberry*, 169 F.Supp. 746 (S.D.N.Y. 1959), observed "/o/ne of the primary purposes of the Act was to establish qualified, impartial Hearing Examiners who would not be mere 'rubber stamps' for the agency's prosecuting arm," *id.* at 754, and reiterated that "/t/he provisions for the appointment of impartial, independent Hearing Examiners are the very heart and soul of the Administrative Procedure Act and variations therefrom should not be countenanced," *id.* at 753.

In *Benton v. United States*, 488 F.2d 1017 (Ct.Cl. 1973), the Court of Claims (now a component of the Federal Circuit) repeated the concern that prompted enactment of section 11, that in the past ALJ's adjudicative "power was not sufficiently protected to guarantee fairness and impartiality . . .," id. at 1021, The Court of Claims echoed the Congress and the Supreme Court, agreeing "that one of the principal problems sought to be corrected by section 11 of the APA was the power of an agency to exert pressure on /an ALJ/ by threatening his removal or discharge." And it recognized "that the APA was a sweeping piece of remedial legislation which was a long time in coming. For that reason, we think it should be given a broad and generous interpretation in light of the objectives sought to be accomplished," id.

Then, in Butz v. Economou, 438 U.S. 478 (1978), the Supreme Court granted ALJs the same absolute immunity from suit for alleged tortious acts in the performance of their functions, granted to judges. It held "that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages. . . . Moreover, federal administrative law requires that agency adjudication contain many of the safeguards as are available in the judicial process." 438 U.S. at 512-13. It concluded, in pertinent part: "There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge. . . . More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." Id. at 513 (emphasis added).

Most recently, in Nash v. Califano, 613 F.2d 10 (2nd Cir, 1980) the appeals court considered the independence of ALJs from agency influence. Nash involved SSA's earlier efforts to increase ALJ "productivity," and ALJ claims that this "interfered with /their/ decisional independence . . . in violation of" the APA. 613 F.2d at 12. The case involved instructions about the length of opinions, id. at 13, delegation of judicial responsibility — and "an arbitrary monthly production quota," characterized as "a performance rating forbidden by" the APA. Id.

The Second Circuit held that the plaintiff ALJ had standing to challenge these encroachments on independence. It analogized the ALJ's function, and the APA's protection of his independence, to that of the Article III Judge:

> These statutory provisions draw upon the more ancient wisdom grounded in history and contained in Article III, which safeguards federal judicial independence through still more stringent independence and tenure provisions. See Kaufman, Chilling Independence, 88 Yale L.J. 681 (1979). The independent judiciary is structurally insulated from the other branches to provide a safe haven for individual liberties in times of crisis. By analogy, "the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." Butz v. Economou, 438 U.S. 478, 513, 98 S.Ct. 2894, 2914, 57 L.Ed 2d 895 (1978).
>
> It is clear that these provisions confer a qualified right of decisional independence upon ALJs. First recognized by the Supreme Court in Ramspeck v. Trial Examiners Conference, 345 U.S. 128, 73 S.Ct. 370, 97 L.Ed. 872 (1953), this special status is a creation of statute, rather than the Constitution. And as their role has expanded, the ALJs' functional comparability to judges has gained recognition.

Id. at 15 (footnote omitted). The Court of Appeals noted:

> The APA creates a comprehensive bulwark to protect ALJs from agency interference. The independence granted ALJs is designed to maintain public confidence in the essential fairness of the process through which Social Security benefits are allocated by ensuring impartial decisionmaking. Since that independence is expressed in terms of such personel rights as compensation, tenure and freedom from performance evaluations and extraordinary review, we cannot say that ALJs are so disinterested as to lack even standing to safeguard their own independence.

Id. at 16 (emphasis added).

IV. SSA POLICIES CONTRAVENE WELL-ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW JUDGE INDEPENDENCE

We submit that SSA is currently trying to circumvent well-established congressional intent. Congress has rejected Executive Branch efforts to limit ALJ Independence by forbidding rating of ALJs on "performance," including "production."

As we have shown, the Congress declared and the courts have confirmed that ALJ's tenure is to be secure like that of judges. The purpose is to assure ALJ's independence, not for their benefit, but for the protection of litigants. In the case of SSA, often indigent or near-indigent individuals appear whose very appearance before the ALJ is usually necessitated by misfortune. ALJ independence ought not be eroded to a shadow in the guise of demanding "productivity."

Despite Congress' expressed intent and the Supreme Court and lower federal courts' repeated echo of that intent, the Executive branch has continued to attack the independence of ALJs. But, so far, Congress and the courts have turned aside every Executive branch attempt to breach the APA's "comprehensive bulwark" that "protect/s/ ALJs from agency interference." Nash, supra, 610 F.2d at 16. This is reason enough to reject SSA's renewed current assault.

The first Executive branch attack on the newly created independence of ALJs came hard on the heels of the APA's enactment, when the Civil Service Commission announced a set of qualification standards for the ALJ positions that a quarter of the previously sitting agency examiner/employees could not meet, and ordered their dismissal. This provoked a furor in the White House and on Capitol Hill; when the air had cleared, the Commission had a new Board of Examiners, which reconsidered the examiner/employees and confirmed nearly all of them in their positions. 9/

The battle was barely over when, in 1950-51, as a former President of FALJC described it,

> The Civil Commission attempted to evaluate incumbent hearing examiners by procedures that allowed for the exercise of substantial political, agency and special interest influence upon the selection and reappointment process. This attempt, which must be recorded in detail before this Committee, ultimately failed. Since that fiasco, and until today, the independence of what is now the administrative law judge function has been institutionally secured by a competitive merit selection procedure and judicial tenure, with judges being subject to removal only for good cause after a hearing before the Civil Service Commission (now the Merit Systems Protection Board). 10/

SSA itself was the next battlefield in the Executive's war on ALJ independence. In the late 1970's came the agency's first attempt to impose production quotas on ALJs. Robert Trachtenberg, Director of the Office in which Social Security Administation ALJs were employed, ordered his ALJs to dispose of 26 cases per month (here it is 20) and announced a program to measure performance. As Trachtenberg later admitted, his orders generated "rancor, distrust and, indeed, poor morale among the ALJs." 11/ Controversy erupted. 12/ A House subcommittee promptly investigated, 13/ seven ALJs filed suit Bono v Califano, No. 77-0819-CV-W-4 (W.D., MO.), and the agency retreated, pledging to put to rest all notions of a quota. In a consent decree settling the case, SSA undertook never again to set "any specific number of dispositions by ALJs as quotas or goals."

By its imposing, and seeking to enforce, its current production quotas, SSA is abrogating its commitments undertaken in Bono.

The Civil Service Reform Act of 1978 (CSRA) left intact the independence of ALJs. Congress expressly excluded ALJs from new, comprehensive performance evaluation provisions, 5 U.S.C. Sec. 4301 et seq. 14/ The ink was hardly dry on the CSRA when the Administration renewed its assault on the independence of ALJs. It was argued that "under the present system ALJs are accountable to no one for their performance."15/ Proposed legislation would have limited ALJs to a seven year term and established standards. 15/ Congress heard testimony and held debate, but the bills died with the end of the 96th

Congress. So today the law, as declared by the Legislative branch, continues strictly to eschew any system of rating the performance of ALJs, on quantity or otherwise.

The quantitative performance standards that cause us to present the FALJC position here are the latest pull in the four decade long tug-o-war between Congress' insistence on ALJ independence and agency efforts to reassert control. SSA's case-per-month quota bypasses the many questions the 96th Congress found too complex and delicate to decide. SSA plods ahead, without the marshalling of legislative facts and the careful weighing of views that is the hallmark of the legislative process. As far as we know SSA did not even solicit the views of those most directly affected, the ALJs themselves, and obviously chose to ignore the record of ALJ opinion the 96th Congress compiled when it investigated the earlier effort to enforce numerical quotas, pp. 19-20 supra.

That record is good reason for Congress' disapproval of all quotas, particularly when combined with other management measures, may:

> /h/ave the cumulative effect of intimidating Administrative Law Judges into . . . fewer reversals of administrative decisions of claims under threat of adverse personnel actions, denial of usual and normal benefits such as training conferences or other threats of retaliation, all to the detriment of the ALJs being able to render fair, impartial, consistent and judicially sound decisions for claimants applying for benefits under the Social Security Act.17/

It was commonly stated that quotas would have the general "effect of denying due process to /Social Security/ claimants." 18/

A numerical quota is especially pernicious because it speaks solely "in terms of faster disposition of cases rather than case quality." It focuses "on 'moving the cases' rather than rendering fair and sound decisions."19/ It ignores the question of quality.

Yet a requirement, under pain of dismissal from one's position and the destruction of one's career, of producing a fixed number of decisions per month, will necessarily lower the quality of decisions.

If the Congress does not alter SSA's practice of imposing numerical quotas, other agencies will certainly follow. The pressure to speed up rates of disposition inevitably will induce ALJs to cut corners, to resort to devices harmful to the trial and decision process: longer hearing days when lawyer, parties and judges are tired; arbitrary exclusion of witnesses and cutting off of cross-examination; refusal of post-hearing briefs, denying the ALJ the benefit of parties' legal and fact arguments; less careful probing to find partially concealed but important issues; hastily written opinions that slough over issues or deal inadequately with them: each a device that may spawn more reversals on court review, with remands for a better record or more, and more specific, findings (thus increasing the workload at the ALJ level). One commentator has warned: . . . /A/t some point before the agency issues its final decision in a major contested case a job must be done somewhere in the agency of preparing a truly careful, comprehensive and useful analysis of all the substantial issues in the case, based upon a careful and objective study of the record and briefs. If this objective is not accomplished in the initial decision and if the administative law judge does merely a perfunctory and superficial job in order to get out a quick decision, that task will then simply have to be performed by someone else before the final agency decision is issued. The net result would be that the agency opinion writers would have to take a much longer time to prepare a draft of a proposed final decision for the agency and accordingly no significant amount of time would have been saved in the long run. Even worse, however, such a practice would have the effect of denying to the parties and the agency the very important benefits which result from the issuance of a comprehensive, careful well-reasoned and useful initial decision by the administrative law judge who has lived with the case from the beginning. In short, haste makes waste.

A desire to speed disposition of a mounting case load may be understandable. But it is no more conducive to justice at the ALJ level than it is at the Supreme Court level. Statements by Supreme Court Justices have reflected the Court's concern that the desire to dispose of the mounting quantity of cases is causing the quality of decisions to suffer. Justices Marshall 20/ and Brennan 21/ have criticized the increasing use of summary dispositions of cases, without briefing and argument. "/S/ignificant issues receive cursory treatment"; the parties are deprived of a full opportunity to be heard on the merits. . . . Justice Stevens has suggested that consideration of cases on their merits is compromised by the pressures of inflated dockets. Surely if the pressure to complete their work concerns Supreme

Court Justices enough that they question its effect on quality, when no authority sits in evaluation of their quantitative performance, then it must be assumed that a speed and quota standard imposed on ALJs cannot but affect the quality of their decisions too.

V. THE CASE-PER-MONTH STANDARD IS ARBITRARY AND CAPRICIOUS

The genesis of SSA's obsession with numerical quotas (the subject of cases now pending before the Merit Systems Protection Board based upon complaints by SSA against three of its ALJs and the Trachtenberg directives that led to the Bono litigation and which were at issue in Nash v. Califano), seems to have been the rapid increase in case load that began in the mid 1970's. SSA's response was to try to increase each ALJ's "productivity"--that is, to speed up the pace of hearings and decisions. SSA's sole concern throughout seems to be the mechanical grinding out of decisions. SSA first computed an "average" rate of decisions for all its ALJs--32 per month. It then "singled out" those ALJs with average rates of 20 or fewer decisions per month. This quota was chosen, not because it was a reasonable, minimum number in light of the nature of the task or the agency's and claimants' needs, but because it provided a manageable number of ALJs to "monitor." 22/

Clearly, the standard adopted by SSA relates purely to administative convenience and disregards precepts of fundamental due process, judicial accuracy and fairness which Congress and the courts have recognized as a necessary ingredient in the quasi-judicial functions of the administrative process. As such, the SSA quotas are arbitrary and capricious.

VI. CONCLUSION

It is plain that SSA is determined to force performance standards on its ALJs. The numerical productivity quota at issue here is but one step in that process. Whether or not SSA's intention is to encroach on its ALJ's decisional independence, continuation of its present course will inevitably have that result. More, it will be a green light to other agencies to take similar actions against their own ALJs--with predictable adverse consequences.

It also is plain that SSA's attempt to impose production quotas or goals, to rate ALJ performance, is in square violation of statute and of the will of Congress repeated time and again. Congress should take remedial action to maintain the viability and credibility of the federal administative judiciary.

Respectfully submitted,

Edwin S Bernstein

Edwin S. Bernstein,
President

Norman Zankel

Norman Zankel,
Legislative Chairman

Dated: June 8, 1983

1/ Hearings on H.R. 6768 before the House Comm. on Post Office and Civil Service, 96th Cong., 2d Sess. 41 (April 24 and May 6, 1980) (statement of Stephen Babcock) (hereafter "Hearings on H.R. 6768").

2/ Message of President John F. Kennedy, H.R. DOC. NO. 135, 57th Cong., 1st Sess. 1-2 (1961) quoted in Macy, The APA and the Hearing Examiner: Products of a Viable Political Society, 27 FED. B. J. 351, 353 (1967) (hereafter "Macy").

3/ Report of the Attorney General's Committee on Administative Procedure, Administrative Procedure in Government Agencies. S. Doc. NO. 8, 77th Cong., 1st Sess. 272 (1941) quoted in Macy at 354 n. 7.

4/ Lubbers, Federal Administrative Law Judges: A Focus on Our Invisible Judiciary, 33 ADMIN. L. REV. 109, 111 (1981) (hereafter "Lubbers"),

5/ 5 U.S.C Sec. 1010 (1946).

6/ All other federal employees can be removed prior to hearing and must pursue their hearing and review rights while in the unemployment line. 5 U.S.C. Sec. 7513; see Arnett v. Kennedy, 416 U.S. 134 (1974). Also see 5 U.S.C. Sec. 7521.

7/ Hearings on H.R. 6768 at 27-28 (testimony of Christopher McNaughton.

8/ FALJC was formerly called The Federal Trial Examiners Conference.

9/ The events have been extensively reported and discussed in the literature. See, e.g. Macy at 364-73; Thomas, The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process, 59 YALE L.J. 431 (1950); Fuchs, The Hearing Examiner Fiasco Under the Administative Procedure Act, 43 HARV. L. REV. 759 (1950).

10/ Hearings on H.R. 6768 at 70-71 (statement of Hon. William Fauver) (emphasis added); see Macy at 368-73.

11/ Affidavit of Robert L. Trachtenberg, Appendix B to Subcomm. on Social Security of the H. Comm. on Ways and Means, Social Security Administrative Law Judges: Survey and Issue Paper, 96th Cong., 1st Sess. 64 (1979) (hereafter " House Survey and Issue Paper").

12/ The level of invective was elevated. Trachtenberg asserted "/U/pon my appointment as Director in January 1975, I discovered the most lethargic, unresponsible, and unaccountable organization that I have ever seen in 15 years as a federal employee." House Survey and Issue Paper at 63. An agency Program Operations Officer rebutted: "Mr. Trachtenberg . . . grossly exaggerates and flagrantly distorts the truth. . . . He appears intoxicatd by his own press relelases: thereby deluding himself in believing that he is the Messiah whose mission was to redeem /the agency/ of all its base and scandalous deeds." at 70.

13/ House Survey and Issue Paper.

14/ Section 4301(2)(D) of Title 5 U.S.C. excludes ALJs, and 5 C.F.R. Sec. 930.211, implementing 5 U.S.C. Sec. 7521, provides that "/a/n agency shall not rate the performance of an administative law judge."

15/ Joint Report to Accompany S. 262 of the S. Comm. on Governmental Affairs and the S. Comm. on the Judiciary, 96th Cong., 1st Sess. 38 (1980 (Part I) (hereafter " Joint Report to Accompany S. 262"). See also Hearings on H.R. 6768 at 4 (testimony of Margery Waxman) ("ALJs today have virtual life tenure").

16/ H.R. 6768; S. 262, 96th Cong., 1st Sess. (1980).

17/ Hearings on H.R. 6768 (Letter of Hon. Ron. Marlenee).

18/ Id. at 16.

19/ House Survey and Issue Paper at 5, 6.

20/ Remarks of Justice Thurgood Marshall, Second Circuit Judicial Conference, September 9, 1962.

21/ Remarks of Williamk J. Brennen, Jr., Third Circuit Judicial Conference, Sepember 9, 1982.

22/ SSA Chief ALJ Brown recently testified at MSPB that 20 was "an appropriate number to be expected."

STATEMENT OF
JOYCE KRUTICK BARLOW
UNITED STATES ADMINISTRATIVE LAW JUDGE
IN THE
DEPARTMENT OF HEALTH & HUMAN SERVICES
BEFORE THE
SENATE SUB COMMITTEE ON OVERSIGHT IN
GOVERNMENT MANAGEMENT

JUNE 8, 1983

Members of the Committee:

It is indeed a privilege to have this opportunity to address you on the three crucial problem areas facing the Social Security adjudicatory system.

As a United States Administrative Law Judge, appointed pursuant to Title 5 of the United States Code, I sit in a judicial capacity within the Department of Health and Human Services, Office of Hearings & Appeals, for the Social Security Administration. Approximately 90% of the matters that come before me focus on the disability program.

It is my understanding that this committee is concerned with investigating practices of the Social Security Administration in three areas which have great impact on the adjudicatory process.

I

The first issue to be addressed is "non-acquiescence." This practice consists of the actions of the Secretary of the Department of Health & Human Services in refusing to follow decisions of Courts with which he or she disagrees.[1] Since the Administrative Law Judge is bound to follow the "Rulings" of the Secretary,[2] this places the Judge in the unenviable position of having to ignore Court holdings in applying the law to the matter before the Judge for decision.

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[1] This practice applies not only to this Department, but to all Departments & agencies within government.

[2] 20 C.F.R. 422.408

In assessing this situation, one must look both to the agency's position and to that of the Judge. Historically, administrative agencies have been given broad power to determine agency policy.[3] In this connection, the United States Supreme Court has said:

> It is a fundamental principle, however, that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy "the relation of remedy to policy is peculiarly a matter for administrative competence." Phelps Dodge Corp. v. NLRB, supra, 313 U.S. 194, 61 S. Ct 852, 85 L. Ed. 1271, 111 A.L.R. 1217. In dealing with the complex problem of adjusting holding company systems in accordance with the legislative standards, the Commission here has accumulated experience and knowledge which no court can hope to attain. Its judgment is entitled to the greatest weight, while recognizing that the Commission's discretion must square with its responsibility. Only if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter. Neither ground of intervention is present in this instance.[4]

This principle flows from the Constitutional doctrine of separation of powers. In this connection, one must not loose sight of the fact that while Administrative Law Judges are Judges in the true sense of the word, we sit within the Executive branch of government, rather than the Judicial branch.

In refusing to acquiesce in decisions with which it disagrees, this agency,[5] relies on the rationale of Mr. Justice Frankfurter in the Phelps Dodge case. Mr. Justice Frankfurter justifies an agency's broad discretion in policy making by noting that Congress left to the agency the task of finding the means to grapple with specific situations. This is clear in his statement "the relation of remedy to policy is peculiarly a matter of administrative competence. ..."[6]

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[3] As will be seen with regard to the second issue before the Committee, this fact provides a basis for actions of the Agency on both issues.

[4] AMERICAN POWER & LIGHT CO.v. SEC, 329 U.S. 90, 67 S.Ct. 133, 146 (1946)

[5] All agencies rely on this rationale.

[6] PHELPS DODGE CORP. v. NLRB, 313 U.S. 177, 61 S. Ct. 845 (141)

Thus, the agency has taken the posture that in administering a national program, it cannot permit disagreements among the Circuit Courts to govern determinations. The Agency's argument is that this would create different standards of adjudication for different parts of the Country.

What is ignored by this Agency in asserting this position is the fact that various court decisions are interpretations of the law rather than statements of policy. Thus, as I have previously stated, the Judge sitting within an agency is forced to disregard interpretations of law by higher judicial authority.

Such a policy goes against the grain of what each Judge (whether an Andministrative Law Judge, or Title III Judge) knows to be the law. As law students and lawyers we were schooled in English Common Law, and taught that the foundation of our judicial system is the doctrine of Stare Decisis. Stare Decisis is defined as the policy to abide by or adhere to decided cases. It is the policy of courts to adhere to precedents and not disturb settled points of law. Further, it is the principle that precedents set are binding on Courts of equal or lower rank.[7] Yet, upon becoming Judges we learn that we must disregard the opinions of higher courts when the Secretary of the Department disagrees with the holding. As lawyers and Judges our reaction is, uniformly, that the Secretary is bound by law to appeal those decisions with which he or she is not happy.

Only a few courts have definitively stated that this practice of nonacquiescence is abhorrent. One United States District Court Judge has emphatically stated:

> An agency of the government entrusted with the administration and enforcement of a federal statute within this district is bound to pay due respect to the decisions of this Court in matters brought before it from said agency and has no right or authority to disregard such decisions. If the agency is dissatisfied with any ruling or decision of this Court, it should seek its reversal or modification by the legal media provided by our laws for the review thereof.
> Absent any such reversal or modification, the refusal or failure to follow such decisions in future cases appears to be contemptuous.[8]

Another District Court Judge has also recognized the Administrative Law Judge's dilemma. While in the particular case, the Secretary's decision was upheld,

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7. BLACK'S LAW DICTIONARY, 4th Ed., Rev.

8. FLORES v. SECY. of HEW, 228 F. Supp 877 (U.S. D.C., D. Puerto Rico, 1964)

Judge Arnold stated " The result of this individual case should not obscure the fact that the regulations of HHS are not the supreme law of the land." (emphasis added) Judge Arnold's full statement on this issue imparts a clear message: Administrative Law Judges must follow court precedents.

> As the Supreme Court has recently stated, 'Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.' HUTTO v. DAVIS, ___U.S.___, 102 S. Ct. 703, 705 70 L. Ed 2d 556 (1982) (per curiam). This statement is equally applicable to the relationship between administrative agencies and lower federal courts.
>
> The Court realized that ALJs are in an awkward position. They are trying to serve two masters: the courts and the Secretary of Health and Human Services. The task is not easy. The ALJ in this case tried conscientiously to carry out this Court's orders, and he is to be commended for that effort. We have decided, largely because of the narrow scope of judicial review to which Congress has confined us, that the Appeals Council's rejection of the ALJ's decision was not unlawful on this record. The result of this individual case should not obscure the fact that the regulations of HHS are not the supreme law of the land. 'It is, emphatically, the province and duty of the judicial department, to say what the law is,' MARBURY v. MADISON, 1 Cranch 137, 177, 2 L. Ed. 60 (1803), and the Secretary will ignore that principle at his peril.[9]

In the same vein, the United States Circuit Court of Appeals for the Third Circuit has stated:

> A decision by this court, not overruled by the United States Supreme Court, is a decision of the court of last resort in this federal judicial circuit. Thus our judgments...are binding on all inferior courts and litigants in the Third Judicial Circuit, and also on administrative agencies when they deal with matters pertaining thereto...(T)he Board is not a court nor is it equal to this court in matters of statutory interpretation. Thus, a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect... For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law.[10]

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9. HILLHOUSE v. HARRIS, 547 F. Supp. 88, 93 (U.S.D.C., W.D. Ark., 1982)
10. ALLEGHENY GEN. HOSP. v. NLRB, 60 F. 2d 965, 970 (3rd Cir., 1979)

An interesting paradox is presented by these decisions. A court rules that non-acquiescence is improper. The Administration may then non-acquiesce to that decision. We as Administrative Law Judges are still bound to follow the ruling of non-acquiescence by virtue of 20 C.F.R. 422.408.[11]

The only remedy available is definitive legislation which would preclude the Administration from issuing rulings of non-acquiescence, and further, directing that the Administrative Law Judge be bound by the law, regulations, and decisions of the various courts.

II

The second issue before this committee is the practice of adopting standards of adjudication contained in the PROGRAM OPERATIONS MANUAL SYSTEM (hereinafter referred to as POMS), thereby altering the statutory definition of disability, and in so doing, bypassing Congress and the public.

The POMS contains the guidelines for adjudication of disability claims utilized by the State Agency. Transmittals containing changes in POMS are sent out as often as twice a week. The standards contained in POMS are often at odds with both statutory and case law.

The Administrative Law Judge and the Appeals Council utilize standards of adjudication contained in 42 U.S.C. 401 et. seq., 42 U.S.C. 1380 et. seq., 20 C.F.R. 404 et. seq., and 20 C.F.R. 416 et. seq.

A great deal of controversy has arisen as a result of the utilization of different standards of adjudication at the various levels. In an attempt to create uniformity in the standards at all levels, the Secretary has instituted a policy of adopting the POMS standards through their issuance as Rulings, thus making them binding on all components of the agency.[12]

In order to properly assess the significance of this action, one must look to the statutory definition of disability. Disability is the:

> ...inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death, or has lasted or can be expected to last for a continuous period of not less than 12 months ...[13]

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[11] A challenge to non-acquiescence is presently pending in LOPEZ v. SCHWEIKER, No 82-5322 (C.D. Cal.)

[12] 20 C.F.R. 422.408

[13] Section 216(i) (1) of the Social Security Act as amended. The same definition is contained in Section 1614 (a) (3) (A) as it relates to the Supplemental Security Income program. In addition, the definition contains specific language dealing with a disabled widow, blind persons, and children under age 18 for SSI purposes. However, for the instant discussion, the basic definition is sufficient.

A framework for reaching a conclusion as to disability is provided in the sequential evaluation process contained in 20 C.F.R. 404. 1520 and 20 C.F.R. 416.920. Two important determinations which must be made in the sequential evaluation deal with whether a claimant suffers from a "severe impairment", and what a claimant's "residual functional capacity" is.

Pursuant to the Regulations, an impairment is "severe" if it significantly limits an individual's ability (either physical or mental) to engage in basic work activities such as sitting, standing, walking, lifting, pushing, pulling, reaching, carrying, seeing, hearing, and speaking, understanding, remembering & carrying out simple instructions, using judgment, responding correctly to work pressure and settings, and dealing with changes in work settings.[14]

Until recently the Administrative Law Judge had broad descretion in reviewing medical reports and evaluating subjective pain to reach a conclusion as to the severity of an impairment. So long as a claimant suffered from a medically determinable condition predicated upon reasonable objective medical evidence, the Judge could, based on that evidence, reach a conclusion that the claimant suffered from a severe impairment. However, in the Secretary's Rulings published in October 1982, certain specific impairments were listed which are presumed to be "non-severe."[15] Thus, the Judge's descretion is now greatly restricted. If a claimant suffers from any of the listed impairments, he or she must be found to be "not disabled." This Ruling incorporates POMS Sec. 2107, and states that "These conditions are not expected to produce symptoms of severe and prolonged pain."[16]

Without going into all the conditions, there are several glaring examples of how the Ruling has altered the definition of disability. Take the following hypothetical: A claimant suffers from uncontrolled hypertension with persistent elevated blood pressure readings (150/115, 140/110, 145/100); he is not obese, but suffers from dizzyness on a regular basis, fatigue, and occasional blackouts. Other than some slight narrowing of the fundi of the eyes, he has no significant end organ damage. Prior to the implementation of SSR 82-55 a Judge could conclude that this is a severe impairment provided he or she believed the subjective complaints of dizzyness, headaches and blackouts, since these problems (resulting from the hypertension) would effect an individual's ability to do basic work activities. (i.e. standing, walking, lifting etc.) However, since the adoption of this Ruling, the Judge is constrained to deny this claimant's application upon the ground that he does not suffer from a severe impairment. Similarly, one must deny a claim of an epileptic with no major motor seizures for 12 months prior to adjudication. What then of the epileptic who suffers only from Petit Mal (or minor motor seizures)? Although this is not mentioned in the Ruling, one might reasonably conclude that a claimant with this type of epilepsy must also be found to have a non-severe impairment. Both of these situations ignore the fact that such individuals have conditions which physicians consider to be severe, and which clearly effect a person's ability to do basic work activities. While such an individual may not be "disabled" he or she should certainly be entitled to have the claim evaluated with respect to other relevant factors (e.g. vocational factors, age, etc.)

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[14] 20 C.F.R. 404.1520, 20 C.F.R. 404.1521, 20 C.F.R. 416.920, 20 C.F.R. 416.921.

[15] SSR 82-55

[16] IBID.

It is interesting to note that this Ruling fails to take into account the fact that each person tolerates pain differently. It also fails to take into account the fact that certain conditions may produce severe pain in individuals depending upon age as a factor.

In examining the non-severe listings for the respiratory system, the Secretary has ignored age as a factor in determining appropriate levels for pulmonary function studies. It is significant that the American Medical Association, in setting forth tables for normal values, utilizes age as a factor.[17]

What is clear from SSR 82-55, is that it was designed to overcome those cases decided by various courts holding that "pain in itself may be a disabling condition."[18]

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17. Guides to the Evaluation of Permanent Impairment, 1977, p. 73, 74.

18. TAYBRON v. HARRIS, NO. 81-1381 slip op. (3rd. Cir., Dec. 22, 1981) (writer's note: this case is pending before me upon remand by the Third Circuit Court of Appeals for a detailed evaluation of pain, and other issues.) see also DOBROWOLSKY v. CALIFANO, 606 F. 2d 403(3rd. Cir., 1979); BAERGA v. RICHARDSON, 500 F. 2d 309 (3rd. Cir., 1974), cert. den., 420 U.S. 931.

The determination as to "residual functional capacity" is also an area which until recently was solely within the descretion of the Judge. However in SSR 82-51, the Secretary has established through a Ruling that POMS criteria regarding "RFC" (residual functional capacity) is binding on the Judge and Appeals Council. Specifically, POMS sections DI. 2096, DI. 00504.115, and DI 100504.120 have been incorporated. This ruling creates specific "RFC" levels for certain impairments. Again as with SSR 82-55, no consideration is rendered to individual assessments. The policy statement is most telling:

> Based on case experience and consultation with disability program physicians throughout the nation, the following impairments have been identified as resulting in predictable physical limitations which preclude specific levels of work based on physical exertion requirements.[19]

Again discretion has been taken from the Judge without legislative direction or public input, and the definition of disability is again significantly altered.

One of the most difficult of these presumptions to accept is that which is contained in Section B(1) of SSR 82-51. In cardiac conditions, an exercise stress test is a common diagnostic procedure.[20] While 20 C.F.R., Appendix 1, Regs. No. 4, Subpart P states that a stress test which is "positive" at 5 METS (1.7 miles per hour at a 10% grade) is abnormal, and may meet the criteria for disability based on medical considerations alone, SSR 82-51 states that where such a test is "negative" at 5 METS but "positive" at 7 METS a claimant is presumed to retain the ability to perform light work in the absence of complications such as congestive heart failure. Thus, even if a claimant's subjective complaints of anginal type pain unrelieved by medication,

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19. SSR 82-51

20. The patient exercises until he heaches a target heart rate. This rate is related to a maximum rate expected for someone of a set age and sex. Patients who have heart disease "reach symptom-limited work capacity before they achieve the targeted heart rate." Cecil, Textbook of Medicine, 15th ed., p. 1226.

dysnepis, sleep disturbance, and fatigue are credible, in all but a very few circumstances, such a claimant must be found to be "not disabled." Interestingly, such a patient is often considered to be severely impaired by the physician, according to guidelines prepared by the American Medical Association. In such a case these guidelines would estimate between 50 and 70 per cent impairment of the whole man.[21]

In reviewing the totality we see that the broad latitude in determining disability which heretofore had been invested in the Judge, has been severely constricted.[22] What emerges is a trend towards a "medical considerations alone" type basis for determination of disability. This is the very standard which has been so widely criticized in dealing with determinations of disability by the various state agencies.

Again, the solution to this problem lies in definitive legislation restricting the alteration of the definition of disability by the Secretary without Congressional approval, and eliminating the binding effect of the Rulings on the Judges.

III

The last issue which I have been asked to address is whether pressure is exerted upon the Judges to issue denial decisions. Needless to say, this is a very sensitive area. Judicial independance is protected by the Administrative Procedure Act (Title 5, U.S.C.). Thus, no one in a position of authority will ever admit to exerting such pressure. Yet it is my belief that the Administration does in fact attempt to sway Judges to deny claims. It is done in a very subtle fashion. Emphasis is heavily placed on attempts to reduce the "reversal rate." The "reversal rate" is the term used to denote the percentage of state agency denials which are reversed by the Judges. While, I have never allowed this pressure to influence my decisions, and I trust that the remainder of the Judges act in the same fashion, such pressure is clearly improper.

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[21] Guides to the Permanent Evaluation of Impairment, p. 81.

[22] I have intentionally eliminated the area of mental impairments, since to discuss this subject would require more time and space than is available. The subject has been dealt with in MENTAL HEALTH ASSN. of MINNESOTA, et. al., v. SCHWEIKER, (U.S.D.C., Minn., 1983, No. 4-82- Civ.83), and resulted in action which was unfavorable to the Secretary. In New Jersey, a similar case is pending; RAMON RIVERA, et. al., v. SCHWEIKER, et.al., (U.S.D.C., N.J., 82-3331)

On my second day as an administrative Law Judge, my "class"[23] was addressed by Rhoda Greenberg, then Director of the Office of Disability Programs. In her remarks she informed us that the State Agencies were correct 95% of the time. I, along with many other Judges felt that this was, in effect, a statement that most claims deserved to be denied. One also wondered why we had been appointed. After all, if the State Agency determinations were correct, why would the agency need more Judges?

Throughout the orientation session (which lasted six weeks) the lecturers, while imparting their vast knowledge of the law and regulations to the new judges, argued with us on mock cases, attempting to convince us that they should not be granted.

Upon arriving in the Hearing Office I learned that each month a tally is made and Washington gets a report as to how many cases each Judge reverses and affirms for that month. Also on a monthly basis, the OHA newsletter published statistics on the national reversal rate and emphasizes in a positive fashion any reduction in reversal rate.

Again, I must reiterate, the pressure is very, very subtle. One of the most effective tools utilized by the Administration to reduce the reversal rate, and encourage denial decisions is the "Bellmon Review." In 1980, Senator Bellmon indicated that he was concerned with "easy" or "lienient" Judges, and "hanging" Judges, and the disparity in their decisions. [24] As a result of the Senator's concern, an ammendment was introduced and passed requiring the Secretary to review "a sample of decisions made by Administrative Law Judges, when those decisions are in favor of the claimant."[25]

In effectuating this, the Social Security Administration Established criteria for review of the Judges decisions by the Appeals Council. Newly appointed Judges are subject to review of all their decisions for approximately six months. However, until very recently, other Judges were selected for review of favorable decisions based upon the percentage of cases they reversed. A Judge would be placed "on Bellmon Review" if his or her reversal rate was 66 2/3 % or higher. Although no directive existed (to my knowledge), it was the common concensus among the Judges across the nation, that if one's reversal rate fell below the 66 2/3 % he or she would be removed from Bellmon Review. We are fortunate that the Corps of Judges within this Department are always mindful that a Judge must not allow facts outside the record to influence a decision. While we have not fallen prey to such outside influences, clearly the manner in which the "Bellmon Ammendment" was implemented has had a chilling effect on the Corps. As Judges we all understand and anticipate that our decisions will be reviewed by a higher tribunal, however to be continually reminded that our favorable decisions are more likely to be reversed is most upsetting. Had the review been effectuated on a purely random sampling of favorable decisions, there would be no difficulty. But, to single out a Judge due to a high reversal rate is to send that Judge a clear message that he or she is "paying too many cases." One needs to be very strong to resist the temptation to deny more claims. Each claimant is entitled to have his or her claim determined upon the evidence contained in the record before the Judge, and not on the issue of whether that Judge has reversed too many cases that month.

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[23] "class" refers to a group of Judges who are sworn in together and spend their orientation period together.

[24] Congressional Record, Jan. 31, 1980, S 720.

[25] Ibid., S720.

If I may take the liberty of paraphrasing a comment of Judge Sirica in his book "To Set The Record Straight", a trial judge must call the shots as he sees them without regard to what an appellate court might do. The appellate court (much like the Monday morning quaterback) has a great deal more time to reflect on the matter than the trial judge who must often make spontaneous decisions without sufficient time for adequate research. The Administrative Law Judge is in the same position as any other trial judge. We cannot be swayed in our decision by what the appellate authority might do.

It is my understanding that the Social Security Administration is looking into other ways to implement the Bellmon Ammendment. However, at this point in time, it is apparent that legislative intent to see that decisions comport with the regulations, has been, to some extent, distorted.

Recently, at the annual meeting of the FEDERAL ADMINISTRATIVE LAW JUDGE CONFERENCE, Mr. Louis B. Hays, the Associate Commissioner for the Office of Hearings and Appeals made several interesting comments regarding reversal rates. He cited with obvious pleasure the fact that the Judges reversal rate has fallen over the last fiscal year and was steadily declining. When I questioned him as to whether there were statistics to show what effect SSR 82-55 had on the reversal rate (since I was now turning down more claims than I would have prior to its issuance), he indicated that there were none. Again, the general tenor of the Commissioner's remarks were that the decrease in reversal rate was commendable.

Although Mr. Hays has shown himself to be a most able administrator, bringing extra staff to the agency (while other agencies are facing RIF's), and bringing into use new and updated equipment to assist us in our work, his remarks must still be construed as indicating pleasure with the decrease in reversal rate. (Thus indicating that a larger number of denial decisions is desirable) While I doubt that these remarks were intended to influence the Judges decisions, they convey the definite impression that denial decisions are preferred.

CONCLUSION

This hearing is not the first time that the Congress has addressed these serious issues. In January 1979, the Subcommittee on Social Security of the House Ways and Means Committee issued a report entitled SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES: Survey and Issue Paper.[26] The evidence presented to that committee dealt with many of the same issues as are before this committee. In 1979, pressure existed for the Judges to deny cases, and non-acquiescence was a severe problem. Unfortunately, to date we have yet to see an adequate remedy.

I should like to take this opportunity to suggest that a proposed bill which would create a HEALTH AND HUMAN SERVICES REVIEW COMMISSION, would alleviate all the problems herein discusses. It is my understanding that through the efforts of Judge Paul Rosenthal and Sen. Howard M. Metzenbaum a draft of this bill has been prepared. I would hope that the Senate give serious consideration to implementing this legislation.

I wish to thank the Members of this Committee for the opportunity to make this Statment on matters of grave concern to every citizen of the United States.

Respectfully submitted:

Joyce Krutick Barlow

JOYCE KRUTICK BARLOW,
U.S. Administrative Law Judge

STATE OF MICHIGAN

JAMES J. BLANCHARD, Governor

DEPARTMENT OF MENTAL HEALTH
LEWIS CASS BUILDING
LANSING, MICHIGAN 48926
C. PATRICK BABCOCK
Director

May 27, 1983

Ms. Linda Gustitus
Governmental Affairs
Room 409C Senate Courts Building
120 C Street, N.E.
Washington, D.C. 20515

Dear Linda:

Attached is the information you requested during your conference call with the Disability Task Force.

The first piece, entitled "Disability Clarified?" supplements material transmitted to you by the Michigan Association of Disability Examiners (MADE). This piece, prepared by Phil Michel, shows the negative impact of POMS changes initiated over the years.

The second piece, a concept paper on face-to-face contacts, was prepared by Jim Tuinstra. This analysis supports the concept contained in S. 476, i.e., that a face-to-face conducted by DDS workers could replace current reconsideration procedures.

I hope this information is useful. The Task Force gained a lot through its preparation. Call if you have questions.

Sincerely,

L. Annette Abrams, Director
Office of Intergovernmental Relations

Chair, Michigan Interagency Task Force
on Disability

Disability Clarified?

The Social Security Administration has alleged that adjustments made in the disability determination process are clarifications rather than changes. Whatever the word used to describe the process, it has substantially contributed to a 50 percent reduction in the number of awards between 1976 and 1982. How could "clarifications" achieve such a drastic decrease in awards?

This note and three attachments will:

(1) Give examples of "clarifications" that have been made.

(2) Illustrate the process by which a clarification intended to reduce inappropriate awards will also increase inappropriate denials.

(3) Illustrate the impacts such clarifications can have upon individuals and upon program costs.

I. The Michigan Association of Disability Examiners (MADE) has provided examples of "clarifications" made via Informational Disgest items, Case Returns, Telex Messages, Regional Memoranda, POM's Releases, and Teleconference summaries. The association is principally concerned that these tiems have not had the scrutiny and comment that would result from publication as regulations. Some of the same examples illustrate the types of clarifications or changes that have substantially reduced allowances.

We have included portions of the MADE paper in Attachment I. The items in the paper often require additional interpretation for law understanding. We have added comments to the examples provided by MADE that we believe are particularly significant or clearly illustrate a general principle.

II. The disability determination process is sequential. At the steps within the process an applicant can be declared ineligible, eligible or subject to further steps. In evaluating a particular impariement or condition specific tests, conditions, diagnoses etc. are individually required before an impairment can be considered "severe or to "meet the listing. Absence of at least one individually "severe" impairment will result in denial regardless of the number of impairments found. Thus, where the regulations or other policy require that five conditions or tests be met all five must be met. Passing four out of five tests has the same effect as passing none.

Medical tests and individual diagnostic criteria are seldom if ever perfect. There are errors of two types associated with most tests. An individual who does not have the condition can test as though he does--false postive--or an individual who has the condition can test as though he does not--false negative. In medical practice these individual errors are overruled by judgements based upon the preponderance of evidence. These judgements are generally forbidden by the current SSA cookbook approach.

The errors that occur can originate from a number of sources.
(1) A simple clerical error can enter the wrong data on a report.
(2) The test can have built in variability from unknown random occurances. SSA often specifies that a single particular value be met rather than a range appropriate to such tests.
(3) The test can be improperly administered.

(4) The applicant may have other conditions that mask the test results.

This inflexable approach is a one way street that will identify and exclude most false positive errors by simply requiring that additional false positive errors also exist before benefits are granted. However, since the additional tests or criteria can only deny rather than approve benefits, the number of false negative errors also grow.

III. We have attached items to illustrate the results of requiring an individual to pass three separate 90 percent accurate tests prior to being found eligible. As illustrated, the procedure is very effective in screening out ineligibles. However, in the process it also screens out 27 percent of those who are truly disabled. It is this one way additive aspect that reduces eligibility as SSA "clarifies" the regulations by requiring that applicants pass additional tests, meet additional criteria. Each false negative error denies more truly eligible.

In past years SSA allowed medical judgement to enter the picture through an equals to the listing category. Doctors used this mechanism to override the obviously false denials resulting from the claims manual cookbook approach. This avenue toward rationality has now been blocked. The number of equals to the listing allowances has decreased by nearly a factor of ten. The examples MADE provided from the POM's manual are telling. Consideration of the "overall" disability or the functional limitations is specifically excluded.

IV. Policy development should consider the effects of both allowing benefits to ineligibles and denying benefits to eligibles. The current SSA policy has focused almost entirely upon the first.

(1) Allowances are reviewed at higher levels denials are not.

(2) Cases decided by Administrative Law Judges with high reversal rates are subject to review. Cases from judges with low reversal rates are not.

(3) Additional criteria are continually added to the disability evaluation procedure.

(4) Partially true presumptions with the effect of denying additional cases are universally applied.

Attachment III is included for purposes of illustrating where the burden of cost lies when such policies are adopted. The illustration simply puts the information from the earlier three test model in fiscal terms. The bottom line is that while overall expenditures have been reduced by 26.8 percent ($670,000) the benefits to truly eligibles have been reduced by 27 percent ($675,000). The entire federal savings has been made from denying benefits to the eligible.

The above illustration has been manufactured but we do not believe that its bottom line exaggerates the true impact of current SSA policy.

ATTACHMENT I

made

May 19, 1983

The Honorable Carl Levin
Senate Office Building
Washington, D.C. 20510

Dear Senator Levin:

On behalf of the Michigan Chapter of the National Association of Disability Examiners, I would like to share with you our professional concern regarding the Social Security Administration's traditional practice of modifying the application of the Social Security Disability Adjudicative Standards without subjecting them to the rule making procedures contained in section 553 of Title 5 of the United States Code.

As you may know, the Michigan Chapter of the National Association of Disability Examiners (NADE) is a professional organization of disability examiners, doctors, and other professionals who are involved in the development and adjudication of Social Security and Supplemental Security disability claims.

We feel that the Social Security Administration must be required to follow the procedures in section 553 of Title 5 of the United States Code when promulgating instructions that in any way modify or otherwise direct the application of the adjudicative standards set forth in the Social Security Disability Regulations. This includes the standards contained in the listings and the Vocational Grids.

Such instructions and clarifications have the potential for affecting the eligibility of a large number of persons filing for or already on disability benefits. It is therefore very important that these instructions and clarifications be subjected to full public consideration and comment before being permanently implemented.

We would like to point out that these instructions have not always resulted in increasing the number of unfavorable decisions on disability claims. In some cases the instructions have served to increase the number of favorable decisions or simply to make more understandable ambiguous sections of the regulations. However, too often these instructions and clarifications have been used to change the way the regulations are applied in order to decrease the number of favorable decisions being made. The most notable example of this is the now infamous "clarification memos" issued in early 1981 which eventually resulted in the Mental Health Association of Minnesota vs. Schweiker Court decision against the Social Security Administration.

Typically, SSA has contended that these instructions are clarifications or guidelines and not changes in policy. What ever they are called, they have the effect of modifying the regulations or directing favorable and/or unfavorable decisions under the regulations.

We recognize an administrative need for SSA to react to advances in medicine and new impairments not dealt with in the regulations or other emergency situations where

Michigan Association of Disability Examiners
Chapter of National Association of Disability Examiners

immediate policies and instructions are needed. A good example of this situation is the very recent appearance of Acquired Immune Deficiency Syndrome (A.I.D.S.). As claims involving this new disease began to be filed, emergency guidelines for the adjudication of these claims were needed. However, immediately after issuance of such emergency instructions SSA should be required to subject these new instructions to section 553 of Title 5 of the United States Code.

SSA generates instructions that modify or affect the application of the regulations in a number of different forms. Often they influence the application and adjudication under a specific regulation through their review and return of cases to the State Agencies by their Quality Assurance Units. It is relatively easy to direct or otherwise, influence the states application or interpretation of a regulation by returning as deficient or in error large numbers of cases that are adjudicated in a manner that is inconsistent with SSA's current perspective on an issue. The states respond quickly to this type of pressure because they must meet certain accuracy requirements (thresholds).

We have enclosed copies of some examples of internal SSA instructions that we feel constitute policy changes that were not subjected to section 553 of Title 5 of the United States Code. These changes directly affect the application of the social security regulations in the adjudication of disability claims. In front of each of the examples we have attached a brief note explaining how the instruction affects the application of the regulations and its general impact if any on the number of favorable or unfavorable decisions.

Sincerely,

Lyle W. Frost II

Lyle W. Frost, II
Chairman
State Legislative Committee
Michigan Association of Disability Examiners

LWF/tab

cc: The Michigan Interagency
Task Force on Disability

Epilepsy

The modification of the epilepsy rules make an irrebutable presumption for those epileptics who do not have an ongoing relationship with a physician. The presumption is that if treatment were ongoing the seizures would decline to a level that would allow the applicant to work. A number of statements imply that the unsuccessful treatment can be attributed to alcohol abuse and the applicant's subsequent failure to comply with the prescribed treatment regimen. It is not enough that the applicant follow a prescribed treatment. That treatment must be accompanied by a "close rapport between the doctor and the patient."

Those applicants who for any reason do not have an ongoing relationship with a treatment source are not eligible. Reasons such as religious beliefs, geographic isolation, lack of funds, lack of understanding, etc. have no impact. It is simply presumed that they would all be able to work if treated.

The above presumption is alike in kind is not detail to the presumption that all young mentally ill who do not meet the listing can work. It may be a reasonable conclusion in many cases but it is not a reasonable presumption. It is known that treatment is not always successful, therefore, the presumption is wrong on its face. It amounts to "catch 22" for those who have stopped treatment due to a lack of funds. They have not sought treatment because they cannot afford it. They are not eligible because they have not sought treatment.

EPILEPSY

Attached is the recently released POMS transmittal number 77 (T2230.A-T2230.4) on the evaluation of epilepsy. This transmittal exceeds the requirements of listings 11.02 and 11.03. These listings require "in spite of at least three months of prescribed treatment" per POMS transmittal #77 for seizures which "are alleged to be occurring at a disabling frequency". The following is essential to a sound determination.

1. An ongoing relationship with a treatment source is necessary. Therefore, in the absence on an ongoing treatment relationship the individual's impairment can not be found to meet or equal the listings for epilepsy.

2. There must be a satisfactory description by the treating physician of the treatment regimen and response.

3. In every instance the records of anticonvulsant blood levels is required before a claim can be allowed.

These requirements are more stringent then those spelled out in the listings. We expect that the application of these changes will result in a decrease of decisions on epilepsy claims.

T2230. Evaluation of Epilepsy

A. General

Modern treatment has been developed which results in good control of seizures for the majority of epileptics. Consequently, only a small minority of such individuals are precluded from engaging in substantial gainful activity (SGA) because their conditions cannot be controlled by appropriate treatment. It has also been conclusively demonstrated that the majority of treatment failures are due to the individual's noncompliance with the prescribed treatment. Noncompliance is usually manifested by failure to continue ongoing medical care and to take medication at the prescribed dosage and frequency. In a substantial number of cases, use of alcohol has been found to be a contributory basis for the individual's failure to properly follow prescribed treatment. In such cases, the individual's alcohol abuse should be evaluated. (See DI 2155ff.)

B. Evidence of Seizures Occurring Despite Treatment

When seizures are alleged to be occurring at a disabling frequency, the following is essential to a sound determination:

1. An ongoing relationship with a treatment source is necessary. "Treatment source" is a licensed physician, irrespective of specialty. To achieve good control of epilepsy, there must be close rapport between doctor and patient so that the doctor can "tailor" anticonvulsant drugs to the patient's needs. There must be a constant treating source to whom the patient turns for advice and treatment, especially when seizure control wavers. It is not necessary that the claimant see the same physician on each visit, e.g., regular visits to an outpatient clinic would be considered an "ongoing relationship." Also, evaluation must be made in light of treatment prescribed by the treating source, irrespective of whether that treatment is necessarily optimal.

   For epilepsy to be accurately evaluated for disability program purposes, the individual's file must contain adequate information regarding the history of the treatment regimen and his or her response to it. If an individual does not have an ongoing treatment relationship, it would be unreasonable to assume that the seizures cannot be controlled with medication, at least to the level at which the listing would not be met or equaled. Therefore, in the absence of an ongoing treatment relationship, the individual's impairment cannot be found to meet or equal the listings for epilepsy. If the listings are not met or equaled, the particular findings in the case must be evaluated to determine the impairment severity and the expected residual functional capacity (RFC). In such cases, if the evaluation of the medical impairment findings in conjunction with consideration of the vocational [illegible] would lead to a [illegible] it is [illegible] therapy.

2. There must be a [illegible] by the treating [illegible] of the [illegible] authoritative description of these findings.)

3. In every instance the record of anticonvulsant blood levels is required before a claim can be allowed.

T2230.1 Development Required When There is an Ongoing Treatment Relationship and the Treating Source Indicates that Frequent Seizures are Occurring

When the treating source indicates that frequent seizures are occurring (or continuing to occur) [illegible] the anticonvulsant therapy, detailed information is necessary to establish whether the seizures are due to factors beyond the individual's control or to noncompliance with prescribed therapy. If the required information is not included in the initial report, it may be necessary to recontact the treating medical source for information on the treatment regimen and the claimant's compliance with it (e.g., whether there have been missed appointments, alcohol abuse, etc.). If satisfactory information on blood drug levels is not available in the treating physician's records, it must be obtained through a purchased examination.

T2230.2 Evaluation of Low Anticonvulsant Blood Levels

The predominant reason for low (or zero) anticonvulsant blood levels is that the individual is not taking the drugs as prescribed. In extremely rare cases, individual idiosyncrasy in absorption or metabolism of the drug causes therapeutically inadequate anticonvulsant blood levels. The reasons for abnormal absorption or metabolism of these drugs is linked to the individual's clinical condition and would have to be recognized by the treating physician in his or her efforts to obtain control of the seizures. Therefore, a finding that low anticonvulsant blood levels are caused by idiosyncrasy in absorption or metabolism must be based on specific descriptive evidence provided by the treating physician.

When reported blood drug levels are low, therefore, the information obtained from the treating physician should include an explanation as to why the levels are low and the results of any relevant diagnostic studies concerning the blood levels. Unless convincing evidence is provided that subtherapeutic blood drug levels are due to abnormal absorption or metabolism, and the prescribed drug dosage is not itself inadequate for Social Security disability evaluation purposes, the conclusion should follow that the individual is not complying with the treatment regimen. Similarly, in cases in which there is convincing evidence of intermittent noncompliance, including seizure activity because of alcohol abuse, little weight should be given to sporadically obtained anticonvulsant blood levels, even if they are in the therapeutic range. In all cases, however, blood drug levels should be evaluated in conjunction with all the other evidence to determine the extent of compliance with the prescribed treatment.

T22[illegible] Listing [illegible]

As set forth in [illegible] of [illegible] 11.00A epilepsy is evaluated accordin[illegible] sequelae [illegible] seizures. Documentation must [illegible] at least one el[illegible]ephalogram, and at least one detailed description of a typical seizure pattern, including all associated phenomena. Due to the nature of the impairment, a complete description of a seizure cannot be obtained from the claimant. Therefore, if professional observation is not available, it is essential that a description be obtained from a third party (i.e., family, neighbors, etc.). However, before such contact is made, the claimant's permission must be obtained.

To meet the listing criteria, major motor seizures must be occurring more freq[illegible] than o[illegible] month (Listing 11.02), or minor motor seizures must occur [illegible] weekly (Listing 11.03), in spite of at least 3 months of [illegible] documentation as to cooperation with [illegible] of impairment severity of [illegible] treatment regimen [illegible] allowance [illegible] at the [illegible]

T2230.4 The Impai[illegible] Listing

If the individual [illegible] following prescribed treatment and the listing is not met or equaled, the sequential evaluation process requires an assessment of RFC. If the claimant is unable to do past relevant work, his or her age, education, training, and work experience, as they relate to the ability to perform any other work, must be considered.

As previously explained, if functional limitations are imposed by seizures but there is no ongoing treatment relationship, the impairment cannot be found to meet or equal the listings. In such cases, the impairment severity and expected RFC must be considered in conjunction with vocational factors. If the individual is found to be disabled, the issue of failure to follow prescribed treatment must be addressed. (See DI 2207-2208.)

It should be noted that there does not have to be an "ongoing treatment relationship" for there to have been "prescribed treatment." In the vast majority of cases where epilepsy has been diagnosed, treatment including drugs has been prescribed.

Evaluation of Prisoner Cases: Title II

T2360. Basic Provisions

The law (P.L. 96-473) provides that title II benefits and determinations of disability for prisoners and persons convicted of felonies will be restricted

The mere accumulation of a number of impairments also will not establish medical equivalence. When an individual suffers from a combination of unrelated impairments, the medical findings of the combined impairments will be compared to the findings of the listed impairment most similar to the individual's most severe impairment. (The functional consequences of the impairments (i.e., RFC), irrespective of their nature or extent, cannot justify a determination of equivalence.)

Any decision that an individual's impairment(s) is medically the equivalent of a listed impairment must be based on findings demonstrated by medically acceptable clinical and laboratory diagnostic techniques. Decisions of equivalence are the responsibility of a physician designated by the Secretary. In most instances, the designated physician is a physician in the State agency. A medical advisor at a hearing or a member of the Appeals Council's (AC) medical support staff (including medical consultants) may also make the physician's decision in the determination of medical equivalence.

As with any other medical opinion concerning impairment severity for titles II and XVI disability purposes, judgments of the examining physician are not controlling on the issue of equivalence. In every instance, the decision as to equivalence is to be made by a program physician based upon the individual medical findings in the particular case.

D. Hearings and Appeals

By comparing the clinical signs, symptoms, and laboratory findings from the evidence of record with those in the listing, the administrative law judge (ALJ) can usually readily determine whether the listing is met. By contrast, a determination that an impairment or combination of impairments is equal to a listed impairment requires greater medical expertise. It must be determined whether the medical findings in the record are of at least equivalent clinical significance to the findings required in the listing.

At the initial and reconsideration levels, the signature of the State agency staff physician on the SSA-831-U5/SSA-833-U5 serves as the basis for the determination and assures that consideration by a physician designated by the Secretary has been given to the question of medical equivalence. At the hearing level, the ALJ is responsible for deciding the ultimate legal question of whether the listing is met or equaled. As trier of the facts, the ALJ is not bound by the medical judgment of a "designated" physician regarding medical equivalency. However, the judgment of a "designated" physician on this issue on the same evidence before the ALJ must be received into the record as expert opinion evidence and given appropriate weight. Furthermore, to assure that proper consideration is given to a medical equivalency opinion from a physician designated by the Secretary, the ALJ must obtain an updated medical judgment in the following circumstances:

1. When no additional medical evidence is received, but, in the opinion of the ALJ, the symptoms, signs, and laboratory findings reported in the record suggest that a judgment of equivalency may be reasonable.

Chronic Obstructive Pulmonary Disease

This ID requires clinical evidence in addition to the ventilation tests required by the regulations. These clinical signs are intended to allow doctors to determine if some condition exists other than chronic objstructive pulmonary disease. If the conclusion is that some other factor exists then the case must be evaluated under the appropriate listing. In brief, the simple fact that you cannot breathe does not necessarily mean you are disabled. Diseases accompanied by ventilation problems will have to meet the listing for that particular disease even though the ventilation tests themselves would be sufficient if the final diagnosis were chronic obstructive pulmonary disease.

DISABILITY OPERATIONAL
POLICY & PROCEDURES

INFORMATIONAL DIGEST

SOCIAL SECURITY ADMINISTRATION
OFFICE OF OPERATIONAL POLICY AND PROCEDURES
OFFICE OF DISABILITY PROGRAMS

PART: ONE
CODE: A3.01a
DATE: April 1982
NUMBER: 82-2

Notice: The discussion presented herein is intended to illustrate the resolution of specific disability issues which have arisen and does not supersede existing operational policy or procedure.

Category: Medical Issues - Respiratory System

Reference: Listing of Impairments, Part A - 3.00; DISM 2201

Issue: What constitutes adequate documentation of chronic obstructive pulmonary disease?

Resolution: The diagnosis of chronic obstructive pulmonary disease is made on the basis of an adequate history, physical examination, and chest X-ray. On the basis of this clinical information, (1) a decision can be made about whether other impairments or diseases are evident which would point to an adjudicative approach utilizing criteria other than those of ventilatory insufficiency, and (2) would also enable the competent physician to ascertain whether the clinical information indicates that the sole impairment is probably due to chronic obstructive pulmonary disease.

The ventilatory function study is not a study which can be used for evaluation, unless it is shown clinically that the applicant has a diagnosis of obstructive pulmonary disease. Where ventilatory studies are indicated by the clinical information, the ventilatory study, in order to be reviewed for reliability and validity, should meet the criteria described in Listing 3.00D. The same criteria apply to individuals who fail to meet Listing 3.02 but who possibly have impairments that may meet the table in DISM 2201, and who also have adverse vocational factors.

An allegation of shortness of breath and a report of ventilatory function study is inadequate for adjudication.

Impairment Severity and Residual Functional Capacity

The effect of the examples included in the POM's is to define a number of impairments as non-severe and therefore ineligible for benefits. In these instances no evaluation of functional capacity is done. The fact that no "severe" incapacity exists results in denial of benefits regardless of functional capacity.

The examples provided by M.A.D.E. point out that the examples of non-severe are not consistent with the listing. Using the examples cited; if an applicant had a lumbar disk removed but no "significant objective abnormal physical findings" he has no severe impairment and is not eligible. No consideration is given to claims of severe and prolonged pain because " . . . the potential for severe and prolonged pain has been considered. These conditions are not expected to produce symptoms of severe and prolonged pain."

If one is unfortunate enough to suffer unexpected severe and prolonged pain, the misfortune will be compunded because SSA will take no cognizance of the fact and benefits will be denied.

Chronic Obstructive Pulmonary Disease

The attached Informational Digest modifies the requirements of Listing 3.00 and 3.02. It adds an additional set of clinical evidence that must be obtained before a favorable decision can be made based on pulmonary function studies that otherwise meet the requirements of Listing 3.00 and 3.02.

This reduced the number of favorable decisions under Listing 3.02.

IMPAIRMENT SEVERITY AND RESIDUAL FUNCTIONAL CAPACITY

Following are excerpts from POMS (2107 and 2210) that provide examples of "non-severe" impairments and examples of specific RFC assessments for given symptom complexes. All of these tend to limit the judgment of impairments on an individual basis.

One example of this that affects many claimants is 2107C/e (excision of a lumbar disc). The emphasis here is on "significant ongoing motor abnormalities". Using this example, many back impairments are cited as non-severe.

Another example of limitation of judgment is reflected by 2210C as a whole. According to this section, one would assume that any cardiac impairment not meeting or equaling the listing provides an RFC for at least light work, in other words, no cardiac impairment would, in itself, limit someone to the full range of sedentary work. SSA claims that this is because the listing includes those capable of sedentary work, however, the listings supposedly reflect conditions that normally preclude all SGA, so this argument is not consistent with the intent of the regulations. (Incidentally, POMS 2201 precludes an RFC for sedentary work solely on the basis of obstructive pulmonary disease - SSA repeats its position that listing 3.02 includes those capable medically of sedentary work - again, this is incompatable with the definition of the listings and violates the intent of the regulations.

Elaboration of Certain Medical Evaluation Concepts

2107. Medical Impairments That Are Not Severe

A. In determining whether an individual is disabled, we follow a sequential evaluation process whereby current work activity, severity and duration of impairment, residual functional capacity, and vocational factors (age, education and work experience) are considered in that order.

Built into this process is the statutory requirement that to be found disabled, an individual must have a severe medically determinable impairment. For an impairment to be considered severe, it must significantly limit the individual's physical or mental capacity to perform one or more basic work-related functions such as standing, walking lifting, handling, seeing, hearing, speaking, and understanding and following simple instructions. An impairment that does not significantly limit the capacity to perform work-related functions, as they are required in most jobs, is not severe.

At that stage in the sequential evaluation process, when we may decide that an impairment is not severe, we do not consider the effects of age, education, and work experience (i.e., the vocational factors) since in such cases the determination is based on medical considerations alone. Similarly, the individual's residual functional capacity is not assessed in cases in which the individual's impairment is determined to be not severe. In such cases, the residual functional capacity assessment is not relevant because it is based upon functional limitations which result from a severe impairment, and, thus, it only comes into play at a later stage in the sequential evaluation process.

B. If an individual had a highly selective job involving unusual work-related functions, a nonsevere impairment may prevent him/her from performing his or her previous work. However, when an individual has a "nonsevere" impairment, no serious question of inability to engage in substantial gainful activity is present because the individual would clearly be able to perform the basic work-related functions as they are required in most jobs. The inability to perform prior work in such an instance would arise from *both* the specific demands of the work and the impairment rather than the impairment itself.

If the individual's impairment is shown by the medical evidence to be not severe in accordance with the criteria and examples described herein, that impairment cannot itself prevent performance of work-related functions, except as they may be required in a highly selective group of jobs. To be found disabled, an individual must have a severe medically determinable impairment. That standard cannot be satisfied by any impairment(s) that is compatible with the ability to perform basic work-related functions as required in most of the numerous jobs in the national economy.

Inasmuch as a nonsevere impairment is one which does not significantly limit basic work-related functions, neither will a combination of two or more such impairments significantly restrict the basic work-related functions needed to do most jobs. However, when a nonservere impairment(s) is imposed upon a severe impairment(s), the combined effect of all impairments must be considered in assessing RFC.

C. The following examples are merely representative of the types of impairments which would be considered not severe and are not intended to be all inclusive. (In formulating these examples, the potential for severe and prolonged pain has been considered.) These conditions are not expected to produce symptoms of severe and prolonged pain.)

1. MUSCULOSKELETAL

- a. Osteoarthritis corroborated by X-ray findings, with symptoms of pain and stiffness of lumbar or cervical spine or major joints, and minimal abnormal findings on physical examination.
- b. Traumatic fracture of a vertebral body, in the absence of metabolic bone disease, with loss of less than 50 percent of height of the vertebra without significant physical findings or neurologic abnormalities.
- c. Excision of lumbar disc has been performed and there are no ongoing significant motor abnormalities or significant objective abnormal physical findings.

2. SPECIAL SENSES

- a. Retention of best corrected visual acuity of 20/40 in the better eye (phakic) without significant restriction of visual fields.
- b. Retention of visual field in better eye of a radius of 45 degrees or better (visual field efficiency of approximately 70 percent).

3. RESPIRATORY

- a. Obstructive airway disease where FEV$_1$ or MVV is greater than values in POMS DI 2201, and there is no clinical evidence of impairment of gas exchange.
- b. Diffuse pulmonary fibrosis where the arterial blood gas values do not meet the requirements of Listing 3.04, table III, at an exercise level of 25 ml. O_2/kg./min., or work equivalent.

4. CARDIOVASCULAR

- a. Hypertension without significant organ damage, current or past.
- b. History of chest pain without specific ischemic findings on ECG (rest and exercise), less than 50 percent narrowing on angiography, and without significant cardiomegaly.
- c. Surgery has been performed for peripheral arterial disease and there are palpable pulses below the femoral level and no intermittent claudication.

5. DIGESTIVE

- a. Colostomy, uncomplicated, with proper function of the stoma and nutrition adequately maintained.
- b. Peptic ulcer, uncomplicated or with recovery from complications.
- c. Chronic liver disease, in the absence of ascites, with total bilirubin less than 1.5 mg. per deciliter and serum albumin is 3.5 gm. per deciliter or greater.
- d. Inflammatory bowel disease (regional enteritis, ulcerative colitis) in clinical remission for 12 months prior to adjudication.

6. GENITO-URINARY

- a. Nephrotic syndrome, in remission, with persistent mild edema in which urinary protein excretion is less than 500 mg. per 24 hours and serum albumin of 3.5 gm. per deciliter or greater.
- b. Chronic renal disease (other than nephrotic syndrome) in which the serum creatinine is persistently less than 3 mg. per deciliter (100 ml.), in the absence of clinical complications.

7. ENDOCRINE

Diabetes mellitus, adult onset, controlled on prescribed therapy, without significant end-organ damage or recent episodes of acidosis.

8. NEUROLOGICAL

- a. Epilepsy with no major motor seizures for 12 months prior to adjudication.
- b. Peripheral neuropathy or neuritis, due to any cause, with no significant motor or sensory loss.

9. MENTAL DISORDERS

IQ of 80 or greater in all major areas of intellectual functioning.

2210. Guidelines for Residual Functional Capacity Assessment in Musculoskeletal and Cardiovascular Impairments

A. General

Based on case experience and consultation with disability program physicians throughout the nation, the following impairments have been identified as resulting in predictable physical limitations which preclude specific levels of work based on physical exertion requirements. The reference in the examples to sedentary, light, medium, and heavy work correspond to the description of these work levels in DI 2382.2.

In many examples, it has not been possible to state a general conclusion on RFC. In such examples, the level of work that is precluded is stated first (e.g., heavy work), followed by the additional restrictions, which, when present, further restrict the RFC. The extent to which any example can be directly applied to adjudication will depend on vocational considerations. For example, the first musculoskeletal item (B.1) states that an individual who meets the description provided for rheumatoid arthritis is unable to perform heavy work. If an individual meets the description in this example and the subsequent vocational assessment establishes that this individual has the vocational capability to perform only jobs requiring heavy work, a favorable decision is warranted. If the vocational assessment shows a vocational capability to perform work below the heavy level, the additional functional considerations in the example are used to distinguish between the functional capacity to perform medium, light and sedentary work.

The conclusions in these examples are directly applicable to the decision only when the individual has no limitations other than those resulting from the medical condition specifically described in each example. The examples are primarily related to physical capacities, including the capacity for sustained exertion, and additional reduction of RFC in other areas—mental, for example—will require further consideration.

B. Examples of Musculoskeletal Impairments

1. Rheumatoid arthritis with clinical evidence of continued activity corroborated by laboratory tests without significant restriction of function of the affected joints. Heavy work activity would be precluded. The distinction between the capacity to perform medium, light and sedentary work activity requires consideration of the joints involved, the extent of involvement, any residual abnormality of these joints, and the status of associated muscles. Consideration of limitation of walking or standing may be pertinent if major joints of the lower extremities are involved. Fine and gross manipulation may be limited if there is involvement of the fingers, hands, or wrists. The complications from, or the side effects of, large doses of medication must be considered.
2. Osteoarthritis of major joints of the lower extremities (hip, knee, ankle) with pain and abnormal finding on physical examination demonstrating significant interference with function of one or more joints and abnormal findings on X-ray. Heavy work activity would be precluded. The distinction between the capacity to perform medium, light and sedentary work activity requires consideration of the joints involved, the extent of involvement (particularly of limitation of motion), and evidence of atrophy of muscles moving that joint. There must be consideration of whether the impairment imposes a significant limitation on walking or standing or more specific activities such as repeated operation of foot controls or climbing stairs.
3. Osteoarthritis of major joints of the upper extremities (shoulder, elbow, wrist-hand) with pain and abnormal findings on physical examination demonstrating significant interference with function of one or more joints and abnormal findings on X-ray. Heavy work activity would be precluded. The distinction between the capacity to perform medium and light work activity requires consideration of the joints involved. Consideration must be given as to whether involvement of the shoulder or elbow significantly restricts the individual's reach.
4. Amputation of lower extremity above the knee, with ability to use prosthesis effectively. The impairment is considered to impose a significant limitation on walking, standing, and climbing stairs. The individual would be limited to sedentary work activity. (Note: These criteria do not apply to amputations due to peripheral arterial disease or diabetic necrosis. See Listing 4.13C or 9.08C.)
5. Amputation of lower extremity at or above the tarsal region, but below the knee, with ability to use prosthesis effectively. Heavy work activity would be precluded. Usually there is no significant restriction in the ability to walk or stand unless there is a complication of the amputation site. There would be a limitation on excessive climbing of stairs and walking on grossly uneven terrain and operating foot controls with the affected extremity. (Note: These criteria do not apply to amputations due to peripheral arterial disease or diabetic necrosis. See Listing 4.13C or 9.08C.)
6. Amputation of upper extremity above the elbow. The individual would be limited to light work activity with additional limitations because of loss of bimanual manipulation and difficulty or inability to handle bulky objects. The limitation on fine manipulation even with the remaining hand would depend upon which was the dominant extremity, the time since loss of the extremity, and subsequent acquisition of any fine manipulative abilities by the remaining nondominant extremity.

7. Amputation of upper extremity below the elbow. Heavy work activity would be precluded. The distinction between the capacity to perform medium and light work activity requires consideration of the extent and condition of the remaining stump and the ability to use a prosthesis. There would be a loss of bilateral fine manipulation and some limitation of gross manipulation. The limitation on fine manipulation, even with the remaining hand, would depend upon which was the dominant extremity, the extent and condition of the remaining stump, the time since loss of the extremity, and subsequent acquisition of any fine manipulative abilities by the remaining nondominant extremity.
8. Replacement of hip or knee. Heavy and medium work activity would be precluded, but the individual is not automatically restricted to sedentary work activity. Function returning after full recovery from surgery must be evaluated to determine the capacity for light work activity. In the evaluation, limitation of walking is a more important consideration than limitation of standing. Consideration must be given to range of motion of the joint, integrity of the associated musculature, evidence of loosening of the prosthesis, and evidence of significant arthritis in other major joints.
9. Status postsurgery for excision of lumbar disc with significant abnormal physical findings short of meeting the Listings. Heavy work activity would be precluded and bending and stooping would be limited. The distinction between the capacity to perform medium, light and sedentary work activity requires consideration of the severity of the underlying orthopedic impairment and any residual neurological abnormalities. Further limitations on ability to walk, stand, or operate foot controls would have to be considered if warranted by the severity of the impairment.
10. Stable fusion of lumbar vertebrae without neurological complications. Heavy work activity would be precluded, but ability to engage in medium work activity ordinarily would be retained. Bending and stooping would be limited. Significant limitation in walking and standing is not expectd.

C. Examples of Cardiovascular Impairments

1. Ischemic disease with angina, treadmill exercise test "negative" at 5 METs, but "positive" at 7 METs or less. Medium work activity would be precluded, but ability to engage in light work activity ordinarily would be retained unless restricted by other cardiac impairments such as congestive heart failure. (The terms "negative" and "postive" are defined in Listing 4.04A.)
2. Ischemic heart disease with angina, treadmill exercise test "negative" at 7 METs, but "positive" at 10 METs or less. Heavy work activity would be precluded, but ability to engage in medium work activity ordinarily would be retained unless restricted by other cardiac impairments such as congestive heart failure. (The terms "negative" and "positive" are defined in Listing 4.04A.)
3. Postmyocardial infarction or coronary artery bypass graft, without angina, congestive heart failure, or significant arrhythmias. Heavy work activity would be precluded unless specific exercise testing establishes the ability to engage in heavy work activity. The distinction between the capacity to perform medium and light work activity requires consideration of the medical evidence describing the individual's clinical condition.
4. Previous congestive heart failure because of "chronic" heart disease, currently compensated and with electrocardiographic and X-ray abnormalities not currently meeting requirements of Listing 4.02. Heavy work activity would be precluded. The distinction between the capacity to perform medium and light work activity requires consideration of the underlying heart disease and the residual impairment.
5. Hypertension without previous congestive heart failure, but with electrocardiographic evidence of left ventricular strain pattern as shown in Listing 4.02.B.2. Heavy work activity would be precluded. The distinction between the capacity to perform medium and light work activity requires consideration of the medical evidence describing the individual's clinical condition, including the extent of cardiac abnormality and any adverse effects of medication.
6. Replacement of heart valve. Heavy work activity would be precluded. The distinction between the capacity to perform medium and light work activity requires consideration of the underlying heart disease, the type of surgery performed, and the residual impairment.

Medical Equivalency

The regulations allow a review "to determine whether the combination of your impairments is medically equal to any listed impairment." The POM's material adds among others the following statements.

(1) As in determining whether the listing is met, it is incorrect to consider whether the listing is equalled on the basis of an assessment of overall functional impairment." (SSA supplied the emphasis.)

(2) The functional consequences of the impairments irrespective of their nature or extent, cannot justify a determination of equivalence. (SSA supplied the emphasis.)

A finding of medical equivalency was made in 44 percent of the cases in 1975, but dropped to 9 percent by 1981. The concept of equivalency was to allow for medical judgement because in SSA's words, "Impairment manifestations are so numerous and varied that it is difficult to include in the listing all the sets of medical findings which describe impairments severe enough to prevent gainful work." Having so stated they then remove the basis for judgement by emphasizing that the decisions cannot be based on an overall assessment or on the functional consequences of the impairments. One may well ask if there is any room left for medical judgement within the POM's cookbook approach.

MEDICAL EQUIVALENCY

The attached instructions from the SSA Program Operations Manual (POMS) 2104B and T2109C deal with the medical equivalence to the listings section 404.1526 of the Social Security Regulations. While these instructions indicate medical judgment is required they set out specific additional criteria that must be met before the judgment that an impairment or combination of impairments is equivalent to (equals) the listings.

These instructions have served to severely restrict the number of favorable decisions being made on this basis.

2104. Does the Individual Have an Impairment(s) Which Meets or Equals the Listing?

A. General

A finding of disability will ordinarily be justified when the individual's impairment is one which is as severe as the impairments contained in the Listing of Impairments. The Listing of Impairments (see Regulations No. 4, Subpart P, Appendix 1) contains over 100 medical conditions which would ordinarily prevent an individual from engaging in *any* gainful activity. The Listings help to assure that determinations or decisions of disability have a sound medical basis, that claimants receive equal treatment throughout the country, and that the majority of persons who are disabled can be readily identified.

The level of severity described in the Listings is such that an individual who is not engaging in SGA and has an impairment or the equivalent of an impairment described therein is generally considered unable to work by reason of the medical impairment alone. Thus, when such an individual's impairment or combination of impairments meets or equals the level of severity described in the Listings, and also meets the duration requirement, disability will be found on the basis of the medical facts alone in the absence of evidence to the contrary (e.g., the actual performance of SGA, or failure to follow prescribed treatment without a justificable reason). *The claimant's impairment(s) must meet or equal a listed impairment for a favorable determination or decision to be based on medical considerations alone.*

B. Evaluating Medical Equivalence—Medical Judgment Required

1. EVALUATION

For an impairment to be found to be equivalent in severity to a listed impairment, the set of symptoms, signs and laboratory findings in the medical evidence supporting a claim must be compared with and found to be equivalent in terms of medical severity and duration to the set of symptoms, signs and laboratory findings specified for a listed impairment. When the individual's impairment is not listed, the set for the most closely analogous listed impairment is used.

Where an individual has a combination of impairments, none of which meets or equals a listed impairment, and each impairment is manifested by a set of symptoms and relevant signs and/or abnormal laboratory findings, the collective medical findings of the combined impairments must be matched to the specific set of symptoms, signs, and laboratory findings of the listed impairment to which they can be most closely related. The mere accumulation of a number of impairments will not establish medical equivalency. In no case are symptoms alone a sufficient basis for establishing the presence of a physical or mental impairment.

2. MEDICAL JUDGMENT REQUIRED

Any decision as to whether an individual's impairment or impairments are medically the equivalent of a listed impairment must be based on medical evidence demonstrated by medically acceptable clinical and laboratory diagnostic techniques, including consideration of a medical judgment about medical equivalence furnished by one or more physicians designated by the Secretary. The Disability Determination Services physician's documented medical judgment as to equivalency meets this regulatory requirements.

T2109. Finding Disability on the Basis of Medical Factors Alone

A. General

A finding of disability on medical grounds alone is made when the individual's medical condition is one which meets the specific criteria in the Listing of Impairments (the listing) or is the equivalent of a listed impairment. The criteria in the listing provide the basic frame of reference for the medical evaluation of all disability claims.

The listing contains over 100 examples of medical conditions which ordinarily prevent an individual from engaging in any gainful activity. The listing permits adjudicators to quickly and readily identify those persons who clearly have disabling impairments.

Impairment manifestations are so numerous and varied that it is difficult to include in the listing all the sets of medical findings which describe impairments severe enough to prevent any gainful work. When the individual does not have any impairment specifically described in the listing, a physician designated by the Secretary of the Department of Health and Human Services is called upon to provide an expert medical judgment as to whether the set of symptoms, signs, and laboratory findings of the individual's impairment(s) is equivalent to one of the sets of symptoms, signs, and laboratory findings contained in the listing. If the individual's impairment(s) has the specific medical findings of a listed set of medical findings or findings that are equal in severity and duration to a set of listed findings, the individual is not considered to be able to engage in any gainful activity and, thus, can be found disabled on medical grounds alone.

Under the Listing of Impairments, the severity of each listed impairment generally precludes the effective performance of any gainful work activity. If an individual has a medical condition with the specific medical findings described in the listing or one that is the medical equivalent of any listed set of findings (and meets the 12-month duration requirement), a finding of disability will be made in the absence of evidence to the contrary (i.e., performance of substantial gainful activity or failure without a good reason to follow prescribed treatment which is expected to restore the capacity to work).

Under the concept of medical equivalence, a physician designated by the Secretary is required to decide whether the medical findings of an individual's impairment(s), although not specifically described by any listed set of medical criteria in the listing, are at least medically equal to one of the listed sets.

B. Impairments That Meet the Listing

An impairment "meets" a listed condition in the Listing of Impairments only when it manifests the specific findings described in the set of medical criteria for that listed impairment. A finding that an impairment meets the listing will not be justified on the basis of a diagnosis alone.

The "level of severity" of impairments in the listing is not defined in terms of the residual functional capacity (RFC) of the individual. When certain functional limitations are specified for a listed impairment, they relate only to the degree of dysfunction for that particular listing section and only to the specific function identified. For example, Listing 1.10C (inability to use a prosthesis effectively, without obligatory assistive devices), relates only to the underlying medical disorder which prohibits the use of a prosthesis and does not directly relate to the standing and walking requirements described for the levels of physical exertion in POMS DI 2382.2.

C. Impairments That Equal a Listed Impairment

To determine whether an impairment or a combination of impairments is of severity equivalent to a listed impairment, the set of symptoms, signs, and laboratory findings in the medical evidence supporting a claim must be compared with the set of symptoms, signs, and laboratory findings specified for the listed impairment most like the individual's impairment(s). The impairment(s) may be judged to be equivalent to a listed impairment only if the medical findings (defined as a set of symptoms, signs, and laboratory findings) are at least equivalent in severity to the set of medical findings for the listed impairment. In no instance will symptoms alone justify a finding of equivalence. (See POMS DI 2205, Evaluation of Symptoms.)

Equivalency can be found under three circumstances:

1. A listed impairment for which one or more of the specified medical findings is missing from the evidence but for which other medical findings of equal or greater clinical significance and relating to the same impairment are present in the medical evidence.

2. An unlisted impairment, in which the set of criteria for the most closely analogous listed impairment is used for comparison with the findings of the unlisted impairment.

3. A combination of impairments (none of which meet or equal a listed impairment), each manifested by a set of symptoms, signs, and laboratory findings which, combined, are determined to be medically equivalent in medical severity to that listed set to which the combined sets can be most closely related.

Medical equivalence may not be established when the reported medical findings reflect lesser severity than listed criteria require (and there are no related findings of equal or greater medical significance).

As in determining whether the listing is met, it is incorrect to consider whether the listing is equaled on the basis of an assessment of overall functional impairment. The level of severity in any particular listing section is depicted by the given set of findings and not by the degree of severity of any single medical finding—no matter to what extent that finding may exceed the listed value.

ATTACHMENT II

THE ARITHMETIC OF DISABILITY DETERMINATION

The Social Security Administration typically requires that applicants for disability meet or exceed specific values on multiple tests or exhibit specific characteristics. The preponderance of evidence notwithstanding, failure to meet a single test or exhibit a specific characteristic, is sufficient for denial of the claim.

The following greatly simplified model is intended to illustrate the effect of adding secondary tests or characteristics to the criteria that must be met for finding that an applicant is disabled.

Assuming that in a group of 1,000 initial applicants there are 500 termed "disabled" who would be truly disabled under some absolute medical test currently unknown to science, and that conversely there are 500 who do not meet that perfect test and would be termed "healthy." Since there are very few perfect tests, SSA had in the past required applicants to pass one test, of 90 percent accuracy, when compared to the theoretically perfect but unknown standard. Further, assume that the 10 percent error in the test is evenly distributed between disabled falsely classified as healthy and healthy falsely classified as disabled. The arithmetic of adding two additional tests is as follows.

Test 1 begins with 1,000 individuals who under a perfect test would divide into 500 disabled and 500 healthy.

Test 1 finds:

DISABLED	HEALTHY
$500\ D \times .90 = 450$	$500\ H \times .90 = 450$
$500\ H \times .10 = 50$	$500\ D \times .10 = 50$
$500d_1$	$500h_1$

that there are 500 d_1 "disabled" and 500 h_1 "healthy." However, within each group 50 persons have been erroneously classified--50 healthy people are termed disabled and 50 disabled people are termed healthy.

Because a single healthy result is enough to deny the application a second test applies to only those who were classified disabled by the first test. This is a group of 450 D's truly disabled and 50 H's truly healthy.

Test 2 finds:

DISABLED	HEALTHY
$450\ D \times .90 = 405D$	$50\ H \times .90 = 45H$
$50\ H \times .10 = 5H$	$450\ D \times .10 = 45D$
$410d_2$	$90h_2$

The second test reduced the number of healthy allowed by 90 percent down to five. However, in doing so it excluded an additional 45 truly disabled.

It is already apparent that the number of disabled being denied is growing faster than the number of healthy being denied by the new test. The two tests combined have denied 95 truly disabled to reduce the original 50 errors to 5.

If one more test is included to further reduce the 5 remaining erroneous allowances, the imbalance becomes even more evident. The third test applies to only those who were classified as disabled by the first two tests, 405D's and 5H's.

Test 3 finds:

DISABLED	HEALTHY
405 D x .90 = 365	5 H x .90 = 4
5 H x .10 = 1	405 D x .10 = 40
$366d_3$	$44h_3$

Thus, at the end of the 3 tests 40 more truly disabled are exluded in order to reduce the number of erroneous allowances by 4. Looking at the three tests in combination we have denied benefits to 135 truly disabled while reducing the number of truly healthy allowed from 50 to 1.

ATTACHMENT III

Who Pays for the Errors?

The above model can be used to illustrate the burden of imperfect tests is predominately carried by the disabled. If it is assumed that each case allowed costs $5,000 per year the following chart shows the overall expenses when one, two and three tests are required.

	One Test	Two Test	Three Test
Total Benefits Paid	$2,500,000	$2,050,000	$1,830,000
Benefits Paid to Healthy Ineligible	250,000	25,000	5,000
Benefits Denied to Truly Disabled	250,000	475,000	675,000

Thus, the addition of two criteria that are individually 90 percent accurate reduces the costs of inappropriate payment by $245,000 (98 percent) while increasing the cost to inappropriately denied applicants by $425,000 (170 percent). Disability trust expenditures are reduced by $630,000. However, the majority of the "savings" have come from the $425,000 denied to the truly disabled by the inaccuracy built into the testing procedure.

Statistics have no meaning on the individual level. Each person inappropriately denied suffers a 100 percent reduction in benefits. Yet, as additional imperfect tests, presumptions, and conditions are added to the disability determination process, the numbers of inappropriate denials inevitably increase.

nade

STATEMENT OF JEANNETTE FANNING, PRESIDENT and

MARTY MARSHALL, LEGISLATIVE CHAIRPERSON

NATIONAL ASSOCIATION OF DISABILITY EXAMINERS

ON

THE ROLE OF THE ADMINISTRATIVE LAW JUDGE IN THE
DISABILITY PROCESS

PRESENTED TO

SENATOR CARL LEVIN, CO-CHAIRMAN, GOVERNMENT OVERSIGHT COMMITTEE

JUNE 8, 1983.

National Association of Disability Examiners

nade

Mr. Chairman and Members of the Committee.

On behalf of the members of the National Association of Disability Examiners, we welcome the opportunity to offer our views on the role of the Administrative Law Judge in the disability process.

The National Association of Disability Examiners' membership is composed primarily of employees in the state Disability Determination Services who adjudicate the Titles II and XVI disability claims for the Social Security Administration.

Much publicity has been directed toward the Social Security Disability Program in recent months, especially in light of the Continuing Disability Investigation Process. This process has taken many persons off the Disability Rolls; many to be returned to the rolls after receiving hearings with the Administrative Law Judges. A great deal of publicity is given the ALJ reversal rate (the reinstatement of beneficiaries to the SSA rolls), emphasizing a two-thirds reversal of State Agency cessations. These figures are not false. Unfortunately, the use of these figures to show erroneous decision-making by the states is incorrect. It is true that mistaken decisions are made, both at the state level and by the ALJs.

It is our belief that the majority of decisions made at both levels are consistent with the criteria permitted to be used. The State Agencies and ALJs do not use the same criteria, even though they represent two portions of the same program. The states are bound by the Programs Operations Manual (POMS) with the medical Listings of Impairments and vocational grids. The Disability Examiner has no direct contact with the beneficiary/claimant, except over the telephone. The Disability Examiner/Physician team must complete a Residual Functional Capacity evaluation to show what a claimant can do in spite of his/her impairment, for vocational considerations based on reports in file. Although the Disability Examiners care about the applicant and beneficiary, they are held to these strict, specific guides and requirements. The ALJs are not. The Administrative Law Judges have more latitude in their review. They have a face-to-face contact with the claimant/beneficiary, providing further insight into such vague areas of evaluation as pain and functional literacy. This may enhance the meanings of the medical records in the case folder. The ALJs are not limited to the POMS, but have available to them the Social Security Rulings and court precedents. The ALJ has at his/her disposal, the examining physician's completed Residual Functional Capacity form; a form completed by the physician actually seeing and examining the claimant. Each of these factors enhances the ALJ decision. Additionally, the ALJ sees the claimant, often months after the State Agency decision. In that period of time new medical conditions can arise, a worsening can occur, and additional evidence, not available to the Disability Examiner, can now be made part of the file. All of these can account for reversals of the lower level decision. This does not make the original decision wrong, especially when the ALJ is now dealing with information the State Agency did not have access to. This does not mean either, that all ALJ reversals are correct.

Section 304(8) of PL 96-265 (The 1980 Disability Amendments) mandated the Social Security Administration to institute a program of ongoing review of ALJ decisions. This provision reflected congressional concerns about the increasing number of disability decisions being appealed to the Hearing level, the high percentage of reversals at that level, and the accuracy and consistency of ALJ decisions. Preliminary findings, reported to Congress by the Secretary of Health and Human Services (January, 1982) based on an initial review of 3,600 ALJ decisions, showed an ALJ allowance rate of 64%. The Appeals Council reviewed the same cases and applied the same ALJ standards, but recommended an allowance in only 48% of the cases. The Office of Assessment (which houses the Disability Analysis Branch-DAB, the State Agency reviewer) when applying the standards governing the State Agencies, showed an allowance rate of 13%.

There are a number of reasons for the differing allowance rates, some of which have been discussed. Because of the different criteria applied at the different levels of adjudication, it should be clear that an ALJ reversal is not prima facie evidence that State Agency decisions are erroneous. As long as the State Agency and ALJ components operate under different standards and procedures, ALJ reversal rates will continue to be high. NADE strongly supports the concept of uniform standards of adjudication at all levels. Only then will there be consistent standards of eligibility in the same Disability Program. Only then will the role of the ALJ not be perceived as an adversarial one to the Disability Examiner.

Social Security Disability Benefits need to be provided claimants in a consistent fashion. The Social Security Administration has begun to take action in this area by consolidating the Social Security Rulings for the ALJs. The Rulings have also been written in the POMS for the State Agency examiner. This is not enough. The State Agencies receive Program Policy Statements, clarifying SSA Rules and Regulations, but the ALJs are not bound by these. The State Agencies are required to follow the other information in the POMS, however, POMS is not binding to the ALJ. It is time SSA aligned the various aspects of its disability program, providing more latitude in the role of the examiner and continued consistency among ALJs. The ALJ has a key role in the disability process, but that role should be carried out within the same framework of rules, regulations and policy binding on the examiner. This would include the same intensive medical and vocational training given Disability Examiners. Consistency in adjudication criteria (more flexibility in the states, stricter guides for the ALJ) would provide claimants/beneficiaries better decisions and less of a feeling of being on a merry-go-round at the different levels. NADE, therefore, supports Section 6 of Senate Bill 476.

The Social Security Administration has now added a third level of review, the Evidentiary Hearing, to an already discrepant system. Nationwide uniformity in the decision-making process is a goal recommended by the General Accounting Office and supported by Congress, the Social Security Administration, and NADE. We are concerned that the face-to-face evidentiary hearings mandated by PL 97-455 will adversely affect this goal by creating a third level of adjudicatory standards, policies and procedures, unless steps are taken to avoid this.

The Social Security Administration has taken the position that SSA (rather than the States) will be responsible for conducting these face-to-face evidentiary hearings and has initiated several pilot projects. These projects to-date, have resulted in substantial reversals of DDS reconsiderations of cessations; showing what flexibility in decision-making can accomplish. NADE is not opposed to the return of these beneficiaries to the disability rolls. We are concerned that these non-state Evidentiary Hearings will add yet another interpretation and application of disability criteria.

In order to promote uniformity at all levels, provide more credibility to the State Agency"s decisions, and provide more consistent, fair and equal treatment to the claimant/beneficiary, NADE has submitted the following proposals to OHA. We present them now for your consideration.

1. That Federal review by Disability Analysis Branch (DAB) be conducted prior to scheduled evidentiary hearings and, during the project, after the hearing.
2. That each reversal be returned to the State, providing an explanation and rationale for such reversal. (Such returns are critical to improving the State operation and assuring uniformity).
3. That States be allowed to apply the same adjudicative concepts as are being applied by the Hearings Officers. This could include giving States the same degree of latitude the Hearings Officers are permitted.
4. That if experience shows that face-to-face improves the decision making process, that it be extended to all reconsideration cases.
5. That evidentiary hearing statistics be maintained and published by reason for reversal (e.g. worsening, new evidence, DDS error, impact of face-to-face,etc).

Further, NADE believes that, above all, there should be only one reviewing office for the entire adjudicatory process, to eliminate three levels of bureaucracy and confusion.

NADE does not support Section 9 (Mandatory Appeal by Secretary of Certain Court Decisions). Court decisions can vary from District to District. It is not reasonable for a National SSA Disability Program to be governed by Regional or District Court decisions. To require the Secretary to acquiesce or appeal individual Appeals Court decisions would be both time consuming and expensive and would not promote uniformity in the decision-making process. If the Secretary must either acquiesce in individual decisions affecting policy or appeal the decision to the Supreme Court, more appeals are likely. This will impact negatively on the individual who was awarded the favorable decision. The disability program would become a reactive program with policy being established by the Courts, rather than through the Administrative Procedures Act and other policy making procedures. It would create a situation, whereby every decision could make a new policy. The decision-making portion of the program could grind to a halt every time a new court decision came into being. We have long supported the establishment of a Social Security Court. Such a court would help lessen the congestion in the Federal Courts. Judges would acquire an expertise in this area because they would be reviewing only Social Security cases. More importantly, it would create a single body of precedent which would be binding at all levels of adjudication, thus increasing uniformity in decision making. We believe this is a much more viable alternative. ALJs, who handle cases other than just disability issues, would become more expert in the issues, if they would be assigned to these courts. Regardless of from where the judges come, their sole training and expertise would be in the policy, medical and vocational aspects of disability.

NADE supports the need for the ALJ in the decision making process. We see the need for some of the latitude conferred on the ALJ, to be brought to the State Agency level. We also see the need for the ALJs and the DDS examiners to be bound by the same criteria. For several years NADE has urged consistency in evaluations at these levels. Public opinion and Congressional initiative should, now, more than ever, bring this need for consistency to the Secretary. Steps are being taken to establish the Disability Court which should alleviate some of the cumbersome problems of hearings. The Evidentiary Hearings will also make the workload of the ALJ more manageable. Hopefully, it will show SSA how flexibility and latitude, within the Rules and Regulations could be provided to the other levels of the Program. There is no good reason for the ALJs and disability examiners to be kept in the adversarial roles they seem to hold within the same Program. The public view of the disability examiner would be enhanced, to match that held of the ALJ. The public, press and sometimes Congress sees the disability examiner as being erroneous, and the ALJ in the role of policeman of the State's decision and protector of the peoples' rights. Such distinction could be avoided if consistency (the key word) in the disability process was applied to all components of adjudication and review. Social Security could then be certain that equitable decisions, for the claimant/beneficiary, and stability for the Disability Program were kept intact.

Associated Staff Attorneys
Office of Hearings and Appeals

National Treasury Employees Union
Chapter 224

June 4, 1983

The Honorable William S. Cohen
United States Senate
Chairman, Committee on
  Oversight of Government Management
SH-530
Washington, D.C.

Re: Social Security Disability Problems

Dear Senator Cohen,

As a staff attorney employed by the Office of Hearings & Appeals (OHA), Social Security Administration (SSA), 400 N. Woodlawn, Wichita, Kansas, I write to advise you of improper SSA/OHA management practices which bear adversely upon the processing of Social Security disability benefit claims filed under the provisions of Titles II and XVI of the Social Security Act.

In the course of my work for OHA, I have examined approximately 2000 disability claim files and drafted as many post-hearing decisions for Administrative Law Judges during the past six years. As executive vice president and chief steward of the Associated Staff Attorneys, I receive information regularly from staff attorneys and administrative law judges throughout the nation advising me of local, regional and national management practices instituted by the Social Security Administration concerning the disability benefit program.

In the normal course of my assigned duties at OHA I have studied much of the federal case law bearing upon both the substance of Social Security disability benefit entitlement and the fairness of the administrative procedures which confront disability claimants.

I conclude that many of the Social Security disability claims policies and procedures, as designed by SSA/OHA, deny fairness and due process of law to thousands of American citizens who apply annually for benefits. The Social Security Administration is treating claimants and their cases as if they are standardized piece-work in a machine shop, rather than human beings requiring careful individual examination.

Consider the following:

1. DISABILITY STANDARD IS IMPROPER

The Social Security Administration is applying an overly restrictive standard of disability, more severe than the law demands or Congress intended by enactment of Titles II and XVI of the Act. This is done by requiring each claimant to "meet or equal" the medical criteria found in the "Listing of Impairments", appendix 1 of the Social Security Regulations. This unrealistic standard, promulgated by SSA, is designed to facilitate administrative convenience and speed case processing; however, it prevents an individualized approach to each case.

Further, at the initial claim consideration level (state agency), the claimant is not even seen by the "examiner" who determines his claim status.

2. CASE PROCESSING: SPEED vs. QUALITY

Social Security employees, including OHA staff attorneys and Administrative Law Judges, are given performance ratings based almost entirely upon speed of processing claim files. Thus, careful analysis and appropriate development of evidence, necessary to fair claims adjudication,are clearly discouraged. For example, OHA staff attorneys are required to complete work on each claim file at the minimum rate of one every four hours, or face disciplinary action and discharge.

I have personally observed that management pressure for speed has discouraged Administrative Law Judges from ordering consultative medical examinations which are often necessary due to poor evidentiary development at lower administrative levels (state agencies).

OHA hearing offices are evaluated by SSA management exclusively on the basis of the number of cases completed per month. The Associate Commissioner of Social Security for Hearings & Appeals, and senior executive service personnel, become eligible for annual performance bonuses based upon reaching pre-determined regional and national case processing quotas, not for the quality of work done.

The pressure for high volume case processing becomes feverish approaching the month of September each year, just before "bonus" time. As a result of the management pressures, many OHA offices have been reduced to falsifying monthly production reports inorder to inflate the "case count."

Example: management personnel in the Minneapolis, Minnesota OHA hearing office "back-dated" disability hearing decisions which were issued in October 1982 inorder to fatten the September case count, thereby cheating the claimants out of part of their 60-day statutory right to appeal the denial of benefits. The 60-day limit on right of appeal commences from the date the claimant is presumed to have received the decision, which is normally 5 days after the date appearing on the decision. After failing to appeal the decision within the 60-day period, the claimant loses all opportunity for review of his claim with respect to the current application.

The back-dating of hearing decisions in Minneapolis, despite the objections of Administrative Law Judges and staff attorneys in that office, is no isolated episode. This practice can be found in many OHA offices throughout the nation, in response to improper pressures from SSA/OHA management officials in Baltimore, Maryland and Arlington, Virginia.

It is also common practice, in those months in which an OHA office has met its case quota, to hold "excess" decisions and to mail them during the following lean month. This "stock piling" of decisions is another symptom of improper quota pressures. Obviously, the claimant must wait until administrative convenience is satisfied before receiving his or her case decision.

These problems are the natural result, in part, of the "Performance Based" employee evaluation systems implemented by the Office of Personnel Management, and massive fears of large Social Security disability case backlogs. In recent years the increase in disability benefit claims has been dramatic, however the Social Security Administration has not maintained sufficient staffing to process the claims properly.

"Productivity," in the Social Security disability claims processing and appeals system, is defined exclusively in terms of speed, not quality. The result is that thousands of claimants do not receive fair consideration, especially at the lower levels (state agencies) which are not protected by the Administrative Procedures Act.

This unfair and inefficient claims system generates endless claimant appeals, paid for by the taxpayers. These problems have developed as the result of administrative policy decisions which have accumulated over a period of more than a decade, and therefore the blame cannot be laid at the feet of any single Presidential administration. I have good reason to believe that these opinions are shared by the majority of the 800 Administrative Law Judges and 400 staff attorneys employed in OHA offices spread throughout the nation.

I recommend legislative action to accomplish the following remedial objectives:

1. Amend the Social Security Act, clarifying the definition of disability with greater specificity, thereby reducing bureaucratic latitude and political influence.

2. Separate the corps of Administrative Law Judges from the administrative fiat and political influence of the Social Security Administration, as proposed in Senate Bill 1275.

3. Create a federal Social Security Court, an Article III speciality appellate court (like the Tax Court), completely insulated from executive branch influence or control, for purposes of establishing a consistent body of case law concerning both substance and procedure for all claims arising under the Social Security Act.

4. A directive, mandating the Office of Personnel Management to implement regulations specifying methods of evaluating Social Security Administration employees based primarily upon quality of performance, and insulating those employees from improper agency pressures for speed.

5. Appointment of the Commissioner of Social Security and Associate Commissioners through a bipartisan congressional committee, inorder to avoid selection of unqualified persons based on political factors.

6. Legislation specifying minimum SSA personnel staffing levels, linked to national and regional case-load factors, to insure sufficient numbers of personnel to process SSA claims properly at all levels.

These measures, combined with the constant vigilence of the Congressional oversight committees, will help restore integrity and quality to the Social Security Disability program. Your consideration is greatly appreciated.

Sincerely,

Richard J. Peckham

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June 17, 1983

William S. Cohen, Chairman
United States Senate
Committee on Governmental Affairs
Subcommittee on Oversight of Government
Management
Washington, D.C. 20510

Re: Role of the ALJ in Title II
Program

Dear Senators:

As your Subcommitte is still formulating recommendations following recent hearings on the role of the Administrative Law Judge in the Social Security Programs the enclosed remarks of Justice Brennan are forwarded for your consideration.

As you can see Justice Brennan emphasized the duty of the ALJ "...to scrupulously and conscientiously explore for all relevant facts," in disability cases. This duty is expressed in a cited footnote on page I as derivative from "... claimant's basic statutory and constitutional right to due process in the adjudication of their claims, including a de novo hearing."

The opinion is dated May 16, 1983. Also enclosed is page 5 of an Interim Circular put out on June 3, 1983 by the Social Security Administration and sent to all ALJ's. How quickly the agency chose to resurrect, under the caption Role of the Administrative Law Judge, its own long forgotten rules about the judges' duty. This same agency has buried the duty of ALJ's under a mound of unreasonable quotas. This same agency has taken upon itself a need to "review" those judges who decide cases in favor of claimants "too often."

The enclosed opinion of Justice Brennan will highlight for your Subcommittee the increasing conflict between quotas (or "goals" as some choose to call them) and the duty of ALJ's under the law. Certainly, it inferentially condemns the efforts to pressure and influence the outcome of an ALJ's decisions in pending cases.

Also, it seems that the U. S. Supreme Court has now underlined the point made by Senator Heflin of Alabama when he introduced his Bill, S. 1275, recently. The bill preserves ALJ's independence. The Senator pointed out that the time is ripe for such legislation. How can any judge satisfy his duty as delineated by the Justice and still race through preparation and hearings to keep pace with the ever-increasing quotas or "goals" set by his agency? An experienced ALJ recently left his position because of the incompatibility between unreasonable demands of the agency and his duty to follow the law (see enclosed May 19, 1983 letter of resignation from C.J. Occhipinti, ALJ).

The enclosed is forwarded for your consideration.

Very truly yours,

Rich'd F. Sprague
Richard F. Sprague, United States
Administrative Law Judge

Russell S. Barone, United States
Administrative Law Judge

Thomas H. Ploss, United States
Administrative Law Judge

Donald C. Niersbach
Donald C. Niersbach, United States
Administrative Law Judge

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

June 16, 1983

Senator Carl Levin
United States Senate
Committee on Governmental Affairs
Subcommittee on Oversight of Government Management
SD-340
Washington, D.C. 20510

Dear Senator Levin:

On June 8, 1983, I appeared as President of the Association of Administrative Law Judges, Inc., before the Subcommittee. Due to time constraints there was not an opportunity to answer one of the questions you posed, and you indicated that you would like an answer at a later time to be placed in the record.

The question you posed was why the review of a judge under the auspices of the Bellmon review as presently conducted was objectionable or caused pressure.

The present method of selecting ALJs for Bellmon review has reportedly been changed, according to the recent testimony of the Associate Commissioner, so that they are no longer selected for review because of higher than average allowance rates. The problem is with those judges previously selected for study for that reason who are still under scrutiny. Being advised that you have been selected for Bellmon review on the basis of your allowance rate is obviously objectionable. It communicates the charge to the judge that something is wrong with his rate of allowance. Additionally, the Associate Commissioner has, in the past, indicated they have found the "high allowing" judges' decisions are more decisionally defective. Therefore, being selected on that basis also communicates to the judge that his decisional product is more defective than others. Being a "targetted judge" is in many respects an unfavorable reflection on the judge, and he is certain to feel prejudiced by it.

Additionally, the management of his cases by the agency is different than those of non-Bellmon study judges. He is under 100% scrutiny and all of his cases are subject to pre-effectuation review.

Judges who are not under the Bellmon study have no such pre-effectuation review. The result is that the claimants who come before the "targetted Judge" are not afforded as speedy a decision effectuation as those who come before a non-targetted judge.

This disparate treatment of one class of judges, as compared to another deprives the claimants who appear before them of the equal protections and immunities of the law, and due process.

This realization is predictably resulting in pressures on the "targetted" ALJs to do whatever they can to remove themselves from this special scrutiny.

A basic objection is that under this system the agency has established a method to rate and evaluate the general performance of an administrative law judge, which practice is contrary to the provisions of the Administrative Procedure Act. At the same time such a rating and evaluation of non-targetted judges is not happening. The message is clearly conveyed that if a judge is selected for Bellmon review, he has every reason to believe that certain standards and criteria are being applied to his work product by the agency, while others escape such pressures.

When you add to this fact the memorandum of the Associate Commissioner issued September 24, 1982 (a copy of which is attached as Exhibit A), advising that a judge's decisional defects must be corrected or he will be subject to further action, the combination of elements is clearly present to permit the agency to intimidate the individual ALJ into correcting his "decisional defects" or suffer adverse action. A judge cannot operate with impartiality in such a pressured atmosphere, and it makes him beholden to the agency for the security of his tenure, which should not be the case.

The circle is complete. The judge has been given every reason to fear that this review is not on a case by case basis, as it should be, to see that justice is being done in that particular case. Quite to the contrary, the major part of this review is designed to correct the judge in the performance of his judicial duties. This prerogative cannot be given to the agency without setting the stage for intimidation of the judge and chilling of his decisional independence.

Even should "high allowance" judges no longer be selected for such review on that basis, as indicated by the Associate Commissioner, the difficulty is not resolved. So long as any judges are on special review, no matter what the reason for their selection, that has as its purpose rating and evaluating the performance of individual ALJs, determining their decisional defects in general, and attempting to "counsel them" and "correct them", as is being done by the agency, the chilling of the decisional independence will continue.

Importantly, the prohibitions of the Administrative Procedure Act and the regulations prohibiting such conduct by the agency will continue to be violated.

The appearance that the judges are not decisionally independent will be unmistakable if this continues.

At the hearing you also asked that examples of "goal setting" be sent to the committee, and I am enclosing certain documents which reflect the communication of "goals in numbers" to ALJs in the field by management officials (copies of which are attached as Exhibits B, C, and D). These are but a few examples of the management pressures in "goals" that are adversely affecting the ALJs in their ability to conduct fair hearings.

The best evidence of what these pressures can do is indicated in the copy of a letter of resignation received by me from a respected administrative law judge who had been with our agency for many years. The Judge describes most effectively what these pressures can do (Exhibit E).

I hope this supplemental information will be of assistance, and thank you for the opportunity to present this information into the record.

Very respectfully,

Charles Bono

Charles N. Bono, President
Association of Administrative
Law Judges, Inc.

Attachments

(Subcommittee note: Exhibit A (Description of the Bellmon Own-Motion Review Program) already appears as part of the SSA response.)

DEPARTMENT OF HEALTH & HUMAN SERVICES

Memorandum

RECEIVED
JUL 8 1982
OHA [illegible]
REGION X

Date July 1, 1982

From Regional Chief Administrative Law Judge
OHA Regional Office, Region X

Subject RCALJ/RMO Conference
Arlington, Virginia - June 16, 17, 1982

To All Administrative Law Judges
Office of Hearings and Appeals, Region X

The theme of the conference was "Quantity, Quality, and Integrity."

I QUANTITY

First of the three goals addressed by Lou Hays was quantity. The pending caseload increases every month, i.e., April 143,323 and May 144,400. Although dispositions increase every month they tend to stay about 1,000 behind receipts. Projections are for a pending of approximately 200,000 cases by mid-1984.

The production goal is for a disposition rate per ALJ of 40 by the end of FY 82 (9-30-82) and 45 each by the end of FY 83 (9-30-83).

Twenty-five percent of all ALJs have already reached the goal of 45 per month. There are approximately 782 ALJs on board so we are talking about 195 plus. This does not represent a lunatic fringe but a substantial number of ALJs who are meeting the goals.

Regional Hearing Offices will be operating out of Chicago, Philadelphia, and Kansas City. These ALJs will be assigned to the respective regional offices and will be committed to travel 75% of their time. Such a "strike force" will reduce backlogs and bottlenecks in those regions. Other regions were invited to consider similar deployment of their resources.

A national hearing office of about six ALJs will be established in either Arlington or Baltimore. There is already a decision writing unit consisting of analysts located in Baltimore. These offices will be used to "put out fires" and meet other emergencies. The national office will be filled by internal transfers.

Along the same lines, Regional word processing centers are being established in Chicago and New York. These units will process backlogs and overflow from the local hearing offices.

There is an effort to support the H/Os with more automation, i.e., word processors, standardized text and automated report processing. Predictably our ability to move cases will improve with the additional equipment and enhanced automation.

The Commissioner has approved increase of our staff to a ratio of 5 to 1. However, Lou Hays wanted the field H/Os to understand that increased staff ratios did not mean increased staff to individual ALJs. The additional staff would be located to gain the greatest capability toward obtaining our goals. Staff will be deployed to most readily result in increased production. That almost certainly means that reconfigured offices will get at least part of the "new pie."

II QUALITY

It is the expressed belief of Lou Hays that quality need not be diminished to achieve quantity. We should not be required to choose between these goals but rather obtain both. However, it is stressed that quantity is necessary to survive.

Part of the response to quality is to be obtained through the Bellmon Review. At present, 15% of all ALJ allowances are reviewed. This will be increased October 1, 1982 to 25%. This 25% will be picked from a selected group of high reversers and from a random sample of all ALJs. Anyone can be picked for review regardless of reversal rate. Study of the Bellmon Review statistics clearly indicates that there is a serious problem related to quality. Approximately 20% of those cases reviewed are taken "on motion" by the Appeals Council. Even in those cases not taken by A/C there is indication of significant errors. We must improve the quality of our decisions.

One way to address decisional errors is training. OHA is presently involved in planning training for all ALJs and staff attorneys. We in Region X are also planning local training.

In the process of improved quality OHA is cooperating with other components of SSA to improve the decisional quality at all levels. In that regard, you will receive new SSA Rulings based on policy as established by the Social Security Administration. The rulings are binding on all ALJs and Appeals Council members.

Another step toward improvement of our decisions is two-fold. One is the elimination of the short form fully favorable reversal and the other is standardized text. By using a long form reversal, it is easier to accomplish the necessary review and realistically determine the basis for reversal. Standardized text whether favorable or unfavorable will insure more uniform decisions which address all issues. The standardized text is imperative when we begin widespread use of the word processing equipment. State of the art equipment should aid us in improvement in both quality and quantity.

Hopefully, some additional insight into improved case handling can be gained from the Government Representative Project. Final regulations for the project have been approved and will be published in the Federal Register in the next couple of months. Five offices will participate in the project. I will share any information that I receive from Central Office on this project.

III INTEGRITY/CREDIBILITY

Under this goal, Associate Commissioner Hays refers to the need for all OHA employees to conform to SSA and other moral and ethical codes of conduct. He has a high personal standard and he expects all to maintain a high level of integrity. OHA cannot afford to tolerate impropriety or misconduct.

In respect to all OHA goals, it was stressed that improved and increased communication is imperative.

The message that was most compelling throughout the conference was the need to increase productivity of OHA as a whole. Reconfiguration is one of the methods to be employed to increase production. Other innovations were discussed. Any configuration which will provide an average of 45 or more per month will be considered. The immediate experience is that reconfiguration is the best method available. Thirty-five offices are presently reconfigured. However, production is the goal and the key is scheduling, hearing and deciding cases. Each ALJ should set at least 50 cases per month. It is clear that the ALJs benefit from innovation or reconfiguration in direct proportion to what they contribute. Successful production ultimately is the responsibility of the ALJ.

Restatement of OHA policy: This is a National program. ALJs are required by virtue of their position to follow the policy of the Secretary. Individual court decisions are not binding on OHA below the Supreme Court level. We are administrative officers despite our quasi-judicial function. We answer directly to the Secretary. This administration has pledged to take a more aggressive posture regarding court decisions. Administration will defend SSA policy and our decisions which clearly follow SSA or HHS policy and regulations.

I will be receiving additional information from time to time and will pass it along to the corps. Some of the matters discussed at the conference will be discussed in more detail in separate memos.

On the whole, the meeting was informative and interesting. OHA is changing so quickly that just keeping up is a substantial challenge.

Doris A. Coonrod

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Hearings and Appeals

SG-F2

Memorandum

LCL-83-037

Date February 3, 1983

From L. Charles Leonard, RCALJ
OHA - Region II

Subject Productivity

To All ALJICs & HOMs

Productivity in the months of December and January was far from what we would like and what we as a Region are capable of doing. I realize that holidays, extensive leave in the absence of a declared exigency, the hiring freeze, and processing backlogs have all contributed to this situation. However, I look forward to a significant improvement in the month of February.

The consumption of 'use or lose' periods of leave is now behind us. Although our hiring freeze has not been lifted, assistance by the word processing operation in the Regional Office has alleviated some of the resulting problems. Also, our Judges traveling from 'low receipts' offices to 'high receipts' offices has helped balance our workload. Consequently, things are now under control and everybody should have enough cases to be fully productive.

At the end of fiscal year 1982, our Region averaged more than the 40 dispositions per ALJ which the Associate Commissioner sought as a goal if we were to keep pace with ever-increasing receipts. From the month of February through the rest of fiscal year 1983, we should make an effort to build up to a minimum of 45 dispositions per ALJ.

I recognize that the "dip" we suffered over the last couple of months was a result of the aberrant conditions with which we were faced, let's try to once again be one of the most effective regions in the country.

Once again let me remind you that I'm available on the phone whether I'm in Manhattan or Hempstead, and that I interrupt my hearings to take calls from the ALJICs.

Charles Leonard

L. Charles Leonard
Regional Chief Administrative Law Judge
OHA - Region II

jmt

OASIS: *With all the reconfigured offices outproducing offices with the traditional OHA organizational setup, shouldn't all offices at some point be reconfigured?*

HAYS: Not necessarily. First of all, there are some traditionally organized hearing offices that perform exceptionally well, that produce very high numbers, and it might not be wise to disturb the arrangements in those offices. In other words, "If it ain't broke, don't fix it."

In addition to that, my general style is to approach things in a more cooperative way rather than merely mandating changes on everyone. But the trend certainly is toward reconfiguration. Many offices have elected to adopt this arrangement. Many more are interested in it. I would predict that within a year or two, the vast majority of our hearing offices will in fact be reconfigured.

OASIS: *Is reconfiguration an example of the OHA Innovation Staff's work?*

HAYS: The Hearing Office Innovation Staff has only been indirectly involved in the reconfiguration initiative. The goal of the Hearing Office Innovation Staff has been to uncover, if you will, innovations that hearing offices have come up with on their own—new or different ways of processing cases or doing business that seem to be efficient and effective. The problem in the past was that nobody else knew about these innovations, and each hearing office was left to re-invent the wheel each time they wanted to deal with a problem.

The Hearing Office Innovation Staff has been going around the country finding out about these good techniques and ideas and then sharing them with all of the other hearing offices in the country. This way, everyone will at least have the opportunity to take advantage of what individual hearing offices have done on their own.

OASIS: *OHA set a productivity goal for the end of this fiscal year of 40 cases a month per ALJ. Are we at or near that?*

HAYS: Nationally, as of the month of June, the average ALJ disposition rate was 35 cases. Based on all of the resources that we have put in the field and the other initiatives as well, I did in fact establish as my personal objective achieving a national average disposition rate of 40 cases per ALJ by the end of this fiscal year, and of 45 by the end of next fiscal year. While many individual ALJs are already performing at that level, and several entire regions will be by September, we may not achieve a national average of 40 this year.

I'm still optimistic that we will be able to achieve the disposition rate of 45 by the end of next fiscal year.

OASIS: *The "SSA representative project" is a new initiative for the agency. Can you outline what the project entails and what we hope to see it accomplish?*

HAYS: An "SSA representative" will represent the government as a party to the hearing in disability cases where the claimant has an official representative. Although we are primarily choosing attorneys to serve as SSA reps, we are also selecting a few non-attorneys. The SSA rep's major functions will include developing case records; contacting the claimant's representative prior to the hearing to discuss the evidence or the matters to be

Exhibit D.

17

DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to:

Memorandum

Date: May 19, 1983

From: C. J. Occhipinti, ALJ
Eugene Hearing Office

Subject: Resignation (Retirement)

To: Doris Coonrod, RCALJ
Region X

Biographical: Private Practice, Member Washington and Alaska Bars; Superior Court Judge May, 1968 to September 1977, Judge Pro Tem, Supreme Court State of Alaska.

This is to advise you that as of the close of business on June 10, 1983, I am electing to retire from Federal Service. I had hoped to remain several more years, but find that the changes imposed make it impossible to remain and retain my integrity. Recent administrative policies appear certain to reduce the judicial adjudication of claims to fast track clerical automated justice. Perhaps this should be expected in an era of computer games and declining values. I leave with regret and deep disappointment. My association with the Social Security Administration has spanned almost nine years, and I regret the turn that the Agency has taken. I do have fond memories of professional managers and concerned employees, who showed a sensitivity for people and the law, and managed to violate neither in discharging their duties. The present irresponsible and ruthless demands being made, however, especially in the area of producing "more" without any valid basis or concern as to the reasonableness and legality, has destroyed this feeling which I had for this Agency.

Many of my colleagues have consciously or unconsciously succumbed to the irresponsible demands, possibly in order to preserve their careers, or in some cases, welcoming the reduction in responsibility and effort - - by merely checking boxes and producing the ever-increasing numbers demanded by those blinded by ambition and impervious to truth and honesty. The disability fund is not really in trouble, and the managers can and will make hay with their impressive statistics, pursuing this irresponsible tact until the full impact of poorly adjudicated cases results in a deficit, or is recognized by honest and responsible legislators for the travesty it really is. (My reversal rate is below the national average, and remands of less than two per year indicates some adherence to quality). However, since it is politically expedient at this time, I find that any cry for sanity is ignored and quality will be lost in the maze of management and bureaucracy.

I cannot thus remain associated with this philosophy, as the integrity of the office I hold, as well as my personal values, cannot be diluted, nor will I condone the methods employed to achieve the questionable goals at the expense of deprived litigants, including the raping of the taxpayers in this process. In all honesty, announcement 318, which presumes to recruit ALJs should be abolished, or drastically revised.

Again, with deep regret, and great disappointment, I feel it is time to leave what is a well intentioned program which has surrendered integrity for expediency.

cc: Lou Hays, Assoc. Comm.
Don Sutcliffe, Reg. Comm.

EXHIBIT E

Summary of Meeting with DDS Advisory Committee on the Implementation of P.L. 97-455

I. Participants

DDS Administrators

Gary Adams
Richard Fairbanks
Leonard Herman
Tim Latta
Lloyd Moses
Dale Place
Bill Vollmer

SSA Participants

Louis Hays
Robert Adams
Fred Arner
Dennis Corriveau
Pat Owens
Jack Torner
Karen Wilson

II. Summary

The meeting opened with a brief discussion led by Louis Hays on the memorandum Commissioner Svahn has released to all DDS Administrators announcing his intention to implement the disability termination hearings process with a combined federal-State approach. This approach will mean that the DDSs will perform case development activities in support of the hearings process in a manner similar to their role in the existing reconsideration process. DDSs will continue to be able to make favorable determinations. Federal hearing officers will be hired to conduct the hearings. This approach has been selected because it will ensure nationwide uniformity in the hearings process while allowing the experience and expertise of the DDSs to be used to maximum advantage.

There was then a presentation by Bob Adams on the provisions of P.L. 97-455 and the planned process to carry out the new hearings process. The legislation requires the Secretary to provide the opportunity for a face-to-face evidentiary hearing at the reconsideration level. The hearings process will only apply to reconsiderations of determinations that a beneficiary is not disabled because the physical or mental impairment on which eligibility is based is found to have ceased, not have existed, or is no longer disabling. The process will be made available for all such cases no later than January 1, 1984. The legislation pertains only to Title II cases. It specifies that steps must be taken to ensure public understanding of the importance of the new process, including establishing procedures which assure that beneficiaries receive reasonable notice of the time and place of the hearing and their opportunity to introduce evidence and be represented by counsel. The agency must also emphasize to beneficiaries the importance of submitting all evidence pertaining to their claim at the reconsideration level.

The planned process will not result in any substantial alteration of the current operating procedures of the DDSs or DOs, nor will there be any change in the nature of the hearing before an administrative law judge. The process will be extended to include SSI cases. The hearings will be structured to fulfill all due process requirements as defined by Goldberg v. Kelly.

The hearings process will be carried out in newly established disability hearing units. To the extent that space is available and arrangements can be made, these units will be co-located with (or located nearby) DOs or DDSs. A consultant has analyzed the distribution of the workloads in order to identify the most efficient manner of locating the units and assigning staff. Based on this study and input from SSA's regional offices, present plans call for the establishment of 57 disability hearing units. Although these units are situated in proximity to most of the caseload, there will still have to be a substantial amount of travel to make the hearings accessible to beneficiaries. The DDS Administrators agreed that there should be some DDSs that will be able to arrange space for the hearing units. SSA staff will be in contact with the DDSs in the near future to explore the possibilities in this area.

Approimately 175 disability hearing officers (including "working" supervisors) will be hired to carry out the process. The preliminary expectations are that the supervisory positions will be GS-13s (35 positions in the larger units) and that there will be a GS-12 rating for the journeyman hearing officer positions. Each unit will have from two to six hearing officers and two or three clericals. Recruitment for the hearing officers will begin in August. The selection criteria will be heavily weighted toward applicants with disability adjudicative experience. A legal background or experience in conducting hearings will not be required. The DDSs will be a major source for recruitment although existing federal employees will likely also qualify and be hired. The DDS Administrators encouraged special efforts to ensure adequate publicity of the recruitment process within the DDSs. There was general agreement by the DDS Administrators of their support for the career opportunities the hearings process might provide for their employees. There was also general agreement that no individual DDS is likely to be too heavily impacted by the recruitment process, since the number of positions to be filled is relatively small on a nationwide basis.

Training for the hearing officers will consist of two weeks of instruction in the conduct of hearings (emphasizing due process requirements and methods of dealing with representatives and controlling the hearings) and one week of programmatic orientation and instruction. Additional training will be provided for the DDSs to highlight changes in their case development activities in support of the hearings process.

Implementation will take place on a phased basis beginning in the fall. The phasing will occur geographically and is necessary so that training requirements can be met and to ensure overall smooth implementation.

The role of the district offices in the planned process will be changed only in relatively minor ways. The forms that are presently completed to initiate the reconsideration process for termination cases will be adapted for use in this process. The DOs will emphasize the need to provide notification of representation and the need to submit any additional evidence early in the process.

The orientation of the DDSs will be to provide complete development of the case in support of the hearing. Case development will be very similar to existing procedures. If the DDS concludes that a claim can be allowed, current procedures for payment effectuation, notification, and quality assurance will be followed. If the DDS does not allow the claim, several new steps will take place. The contents of the file will be realigned to facilitate the hearing officer's review of the folder. In addition, a form will be completed to summarize the evidence for the hearing. The case will then be forwarded to the disability hearing unit.

During the course of DDS development of the case, hearing scheduling activities will be carried out in scheduling units. Approximately seven such units will be established. The units will be staffed by federal employees. They will be responsible for operating an automated system for planning hearing schedules and for providing notices to beneficiaries. The scheduling system is designed to streamline the hearing process to minimize the time between completion of the DDS case development and the conduct of the hearing.

Cases received by the disability hearing units will be screened on a sample basis by supervisors to ensure that all necessary case development has been provided by the DDS. Files will be available to beneficiaries and their representatives for review up to one half hour prior to the hearing. The hearings will be informal proceedings. No tape recording will take place. Hearing officers will conduct four or five hearings per day. On the average, 20 minutes will be allowed for the hearing officer to review the file, the hearing will take 30 to 45 minutes, and 20 to 25 minutes will be allotted for preparation of the decision immediately after the hearing. Hearing officers will complete a form during the hearing summarizing the facts and evidence to be considered. Medical consultation will not be required as part of the decisionmaking process, although hearing officers will be allowed to obtain general information from medical and vocational sources. Any RFC determination will be made by the hearing officer, either by adopting an RFC prepared by the DDS or modifying that assessment based on the hearing. Decisions will be handwritten on pre-printed forms, although word processing may eventually be used for typing decisions. There will be exceptions to preparing the decision immediately after the hearing, but these cases will be relatively rare and will be subject to supervisory review. One category of exception will be to send the case back to the DDS for additional development if, for some reason, the hearing officer is unable to reach a decision based on the information in the file. Decisions will be issued based on the record if the claimant fails to appear or waives the right to appear at the hearing.

Quality assurance of hearing officer decisions will be carried out through the Office of Assessment. The DABs will review a sample of decisions on a pre-effectuation basis. Sample sizes are yet to be determined. Errors will be routed to disability hearings staff for concurrence.

In response to the description of the process, the advisory committee made the following recommendations:

(1) Any notices and information provided to the claimant should strongly emphasize the need to cooperate with the DDS by attending any scheduled medical examinations. Specific procedures will also have to be developed to describe what will be done in situations involving non-cooperation by claimants during the course of DDS development of the case. OHA staff agreed with these recommendations.

(2) Policies for payment of claimants to travel to medical examinations need to be clarified. OHA staff agreed to investigate this area.

(3) The need for interpreters at hearings needs to be accomodated. OHA staff agreed with this recommendation.

(4) The policy and procedures for photocopying of files by claimants and their representatives needs to be specified. OHA staff agreed with this recommendation.

(5) Each disability hearing unit will need to be given specific names of contacts for medical and vocational information. OHA staff agreed with this recommendation.

(6) DDS staff (including doctors) should not be forced to participate as witnesses during hearings. The OHA staff's preliminary thinking is in support of this position.

(7) Procedures need to be established to provide full feedback to the DDSs regarding the DAB's review of hearing officer decisions. OHA staff agreed with this recommendation.

(8) The DDSs will need a mechanism to discuss questions or concerns regarding those cases routed back to the DDS from the disability hearing unit because of the need for further development. OHA staff agreed that both formal and informal procedures will need to be developed.

(9) Scheduling procedures should be designed in such a way as to allow DDSs the opportunity to delay scheduling of hearings whenever case development has not been completed. OHA staff agreed with the recommendation.

Dennis Corriveau then presented a description of the pilot projects for the disability hearing process. The pilots are intended to assess the reasonableness and effectiveness of the proposed process and to help identify any revisions that will be necessary for the fully operational process. The pilots are being coordinated by the Dallas and San Francisco Regional Offices. Disability hearing units have been established in Albuquerque, New Mexico; Dallas, Texas; and Oakland, California. Cases are now being developed for the hearing process by the DDSs serving these areas, and hearings will be held for about two months beginning March 23. Approximately 600 cases will be processed in each region. Hearing officers participating in the pilots come from both the federal government and the States. Quality assurance is being carried out by the DABs. Evaluation of the pilots will be based on on-site evaluations and statistical information generated during the project. The DDS Administrators also suggested follow-up interviews with claimants and representatives.

The meeting concluded with a discussion of the future role of the advisory committee. Periodic meetings will be held, with the next meeting probably to be scheduled in approximately two months after the results of the pilot projects become available. The committee will also be provided with drafts of forms, procedures, and other documents for comment.

UNITED STATES GOVERNMENT

memorandum

DATE: June 3, 1981

REPLY TO ATTN OF: ALJ Jacob Friedes
OHA, Buffalo, NY

SUBJECT: Production Quota and Efficiency Rating

TO: Andrew Young
Associate Commissioner for Hearings and Appeals

Please advise us (1) whether ALJs are subject to any production quota and (2) whether an ALJ in a particular office has to match the production of his peers in his office. If the latter is true, is this not equivalent to a production quota? These questions are presented by the attached copies of a memorandum dated May 15, 1981 from RCALJ L. Charles Leonard and a reply memorandum dated May 20, 1981 from ALJIC Avram Weisberger. These memoranda are most disturbing to me for several reasons. First, RCALJ Leonard has set up the production of my peers in my office as a quota by comparing their production to mine. Second, he has completely ignored the qualitative aspect of our work. The maxim, "Justice delayed is justice denied", still deals with JUSTICE. Quick production, *per se*, is not justice. We are dealing with the lives of people and the public treasury. I have tried, and continue to try, to obtain quality and quantity. Thus qualitative as well as quantitive considerations are equally important. Qualitative considerations include questions as to whether the ALJ checked to see that exhibits have been properly pulled; expert witnesses (vocational experts, medical advisors) have been properly included or excluded; issues have been properly framed in Notice of Hearing; proper pre-hearing and post-hearing development has been obtained; testimonial evidence from claimants and witnesses has been fully secured at hearings; cases have been properly decided; and decisions have been properly written. Are both the quantity and quality aspect of the ALJ's performance within the jurisdiction of the RCALJ or are they within the jurisdiction of the Appeals Council? What quantitative and qualitative standards are being used in the evaluation of the ALJ's performance by the appropriate reviewing body (bodies)?

Third, perhaps the proper question is-how does my current production compare to my previous production? In the calendar year 1979 I had an experienced staff, we (because this is a team effort) disposed of 411 cases which is better than 34 a month. In the period, June 1980 through May 1981, I generally had an inexperienced staff attorney or no staff attorney, except for a very brief period when I had an experienced staff attorney who was seeking legal employment outside government service and secured same. Also for the last five to six months during this period, I have had a new staff attorney, a new secretary, and a new hearing assistant, all of whom I have had to guide. In addition, during this period, I used up six weeks of vacation (one "use or lose" week representing a carry-over from an extended previous period). During this period, we disposed of 258 cases. If "my

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GSA FPMR (41 CFR) 101-11.6
5010-112

production" of 258 is divided by 12 months, "my monthly production" is 21.5 for this period. If the six weeks non-productive vacation time were eliminated, "my monthly production" during my actual work time is increased to 24.5 dispositions. I must also point out that during the calendar year 1979, the office manager supervised staff which pulled and marked exhibits, obtained descriptions of the professional qualifications of reporting physicians, and did some pre-hearing development. None of such work has been available to me for at least the past five months. As a result, since February 1981, I have been holding my own hearings and summarizing my cases without a hearing assistant so that my hearing assistant (who is "new" at this job) will have an opportunity to learn it and also do the work formerly done for us by the office manager's staff with the help of my new secretary.

My ALJIC in his memorandum of May 20, 1981 reported that "in general" I work very hard, etc. I do not work very hard in general; I work very hard regularly, week in and week out, and have done so for the past 16 years that I have been employed in our Buffalo OHA office. My work week, year-in and year-out, has averaged 60 hours. It is true that I spend a large amount of time in pre-hearing and post-hearing development. However, I do not always write very detailed decisions since their length varies from case to case. I also spend a considerable amount of time in the actual hearing process. I am certainly not asserting that my work style should be the norm. However, by the same token, the RCALJ and the ALJIC (impliedly) have set up their own work style norms. Is there not a place, if not a requirement, for diversity in work styles among ALJs or do we all have to conform to one work style which is realistically geared overwhelmingly, if not entirely, to production? If so, what happens to due process of law for the claimant, for the government, and for the taxpayer?

I have presented to you the foregoing detailed explanation of all the circumstances affecting my "production" in 1979 and for the past 12 months as a matter of courtesy. In my opinion, the attached memoranda raise serious legal questions, namely, (1) whether they indirectly and by implication impose upon me a "production quota"— the production rate of other judges in this office— which is contrary to your own frequently stated policy and which is clearly in violation of the Bono settlement; and (2) whether they constitute efficiency rating, and, if so, whether RCALJ Leonard or ALJIC Weisberger has lawful authority to make such ratings with respect to me or any other judge appointed under the Administrative Procedure Act. Accordingly, I respectfully request that the memoranda of RCALJ Leonard and ALJIC Weisberger be expunged from my personal file.

Is it possible that progressively increasing one-sided emphasis on production has increased, rather than decreased, OHA's caseload? Has such emphasis reduced quality of workmanship with increasing reversals and remands? Have these in turn stimulated the appeal of more marginal claims through hearing, especially by adversarial-oriented attorneys whose fees have been soaring? Have these increasing marginal claims further increased the production fixation?

Jacob Friedes
Administrative Law Judge
U.S. Court House-Room 404
68 Court Street
Buffalo, New York 14202

cc: RCALJ L. Charles Leonard, OHA, Region II
ALJIC Avram Weisberger, OHA, Buffalo, NY

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Hearings and Appeals

Memorandum

LCL-81-336

Date	May 15, 1981
From	L. Charles Leonard, RCALJ OHA - Region II
Subject	Jacob Friedes, ALJ
To	Avram Weisberger, ALJIC Buffalo Hearing Office

It has been brought to my attention that in the month of April, Judge Friedes disposed of 22 cases. This number represents his approximate average over the prior 12 months as well. What is particularly striking about this figure is that it is so inconsistent with the performance of all other judges in your office. I would be interested in knowing if there is a particular problem involving Judge Friedes which may account for this.

Please meet with Judge Friedes and discuss this situation with him. After your meeting, please send me a written report as to the result of your conversation, including your estimate of what the future might hold with respect to Judge Friedes' performance in the Buffalo Hearing Office.

Charles Leonard

L. Charles Leonard
Regional Chief Administrative Law Judge
OHA - Region II

AD/eq

UNITED STATES GOVERNMENT
# memorandum

DATE: May 20, 1981

REPLY TO ATTN OF: Avram Weisberger, ALJIC
Buffalo OHA - Region II

SUBJECT: Jacob Friedes, ALJ

TO: L. Charles Leonard, RCALJ
OHA - Region II

In response to your memorandum to me, dated May 15, 1981, concerning the above subject, I wish to advise you that I had a discussion with Judge Friedes on Wednesday, May 20. I showed him your memorandum, and he stated that when he had his former staff attorney, Mark Haydu, who has since resigned, he was averaging 34 dispositions per month. He also questioned why the Regional Chief Administrative Law Judge did not write to him at that time acknowledging his disposition of 34 cases a month.

Judge Friedes also stated that when he was averaging 30 dispositions a month, he was receiving approximately 60 cases a year that had been screened previously and that could be disposed of in a simple fashion. In contrast, he said that in the past 12 months he has received only a handful of such cases.

He also stated that in the last 4 to 5 months he has had a new hearing assistant, a new secretary, and a new staff attorney. He said further that for the last 3 months he has been holding his own hearings without a hearing assistant and making his own summaries of cases. He said that this has been necessary because the pre-hearing development is being done by his own staff rather than by the development unit. He also stated that in general he works overtime, and the prior week worked at least 60 hours.

As you are aware, our office has a development unit which serves those Judges that, due to a shortage of staff, do not have their own complete staff. Inasmuch as Judge Friedes has his own full staff, it is up to his staff to do his pre-hearing development and screen cases to cull out those that may be disposed of simply.

It is my estimate that in general Judge Friedes works very hard and spends a large amount of time in pre-hearing development, post-hearing development, and writing very detailed decisions.

Avram Weisberger
ALJIC

cc: ALJ Friedes
cp

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DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to: SGE1

Memorandum

Date: JUL 8 1981

From: Chief Administrative Law Judge

Subject: Production Quota and Efficiency Rating

To: Jacob Friedes
Administrative Law Judge
Buffalo

Associate Commissioner Young has asked that I respond to your memorandum of June 3, 1981. Your memorandum disturbed me because I believe you have misinterpreted the intent and purpose of RCALJ Leonard's May 15, 1981 memorandum to ALJIC Weisberger.

RCALJ Leonard's reference to your average monthly disposition rate does not constitute an "efficiency rating." OHA ALJs are not "subject to any production quota." Likewise, there is no OHA policy requiring that "an ALJ in a particular office has to match the production of his peers in his office." In addition, there is no intention to ignore quality, justice and due process in search of quantity. However, one of the bottom-line measures of the effectiveness of the hearing process is the number of cases heard and decided. Accordingly, each of the RCALJs were encouraged to review the production levels of their ALJs and ascertain if there were problems inhibiting the disposition of cases.

In view of the fact that there are no ALJ production quotas, it is only reasonable that RCALJ Leonard used the average of the ALJs in each office as the basis for comparison and inquiry. As is clearly stated in his memorandum to ALJIC Weisberger, RCALJ Leonard, having established that your individual production level was significantly lower than the other ALJs, was seeking to determine if any particular problems existed. It is only by isolating and identifying problems that we can initiate action to correct them, improve the situation and, hopefully, prevent a recurrence.

You have asked whether the RCALJ or the Appeals Council has jurisdiction for evaluation of ALJ performance. As I am sure you are well aware, ALJs do not receive performance evaluations. Therefore, neither the RCALJ nor the Appeals Council has this authority. On the other hand, it is the responsibility of every OHA component and employee to seek out the means by which to improve our efficiency and effectiveness in order to insure that every claimant receives a fair and timely hearing and decision.

Far from suggesting that "we all have to conform to one work style," we fully recognize that there may be several alternative and viable solutions to the same basic problem. We further recognize that what may work for one hearing office or ALJ may not be the best for another. This recognition, however, requires that we come to grips with the need for change in order to successfully serve the public.

I share your concern of inexperienced staff and realize that this does hamper your ability to dispose of cases. However, this is not a unique situation in the Buffalo Hearing Office, it is a nationwide problem. As you know we have been working under hiring restrictions. For this reason, it is essential that we explore ways in which to better utilize our resources. If you can devise ways in which you feel will increase your ability to dispose of cases, I encourage you to discuss this with ALJIC Weisberger.

I also share your concern for decisional quality. Certainly, decisions which are not based on proper application of the law and regulations or which are not supported by the evidence do not serve the public or the agency, regardless of the volume of such decisions. Your fellow ALJs, however, have demonstrated that productivity can be increased while still maintaining a high level of quality.

I do not comprehend your suggestion that our workload has increased because there has been increased dispositions. Purely and simply, the reason for our high pending workload is record-breaking high levels of receipts of requests for hearing. Certainly, as total receipts increase so do what you have referred to as the "marginal claims." As ALJs it is our obligation to provide fair and timely hearings and decisions to the fullest extent possible. Accordingly, while we all hope that the tide will slacken, we cannot sit back and complacently continue doing things just as they have been done in the past while waiting for this to occur.

I sincerely wish that you will put forth the extra effort to dispose of additional cases to help us reduce our ever increasing backlog, which will enable us to meet our mission of granting claimants timely hearings and prompt decisions. I trust that when you have had a chance to reflect on this you will agree.

Thank you for your cooperation and if we can assist you please feel free to contact us.

Philip T. Brown

Philip T. Brown

cc: RCALJ Leonard
ALJIC Weisberger

DEPARTMENT OF HEALTH & HUMAN SERVICES **Office of Hearings and Appeals**

Memorandum

LCL-82-328

Date July 2, 1982

From L. Charles Leonard, RCALJ
OHA - Region II

Subject Postponements

To Jacob Friedes, ALJ

Through: Avram Weisberger, ALJIC
Buffalo OHA

I have your memo of June 23, 1982, pointing out that my figures were inaccurate and that you actually scheduled 36 hearings, and that 30%, not 50%, were postponed. All I can say is that my figures were supplied by the Buffalo OHA Office.

I'm not setting any quotas on postponements or the number of cases to be scheduled. I'm merely trying to find out if help is needed.

But we can't escape the fact that excessive postponements are a substantial problem; and if we don't get rid of our backlog, OHA will have a credibility problem of its own.

I appreciate your cooperation in our joint effort to reduce the number of adjournments.

Charlie Leonard
L. Charles Leonard
Regional Chief Administrative Law Judge
OHA - Region II

jmt

cc: Paul Teitler, ALJ
Camden OHA

UNITED STATES GOVERNMENT
# memorandum

DATE: June 23, 1982

REPLY TO ATTN OF: Avram Weisberger, ALJIC
Buffalo OHA

SUBJECT: ALJ Jacob Friedes

TO: L. Charles Leonard, RCALJ
OHA - Region II

On June 16, 1982 I had a discussion with Judge Friedes relative to the questions you raised in your memorandum to me of June 2, 1982. I have attached Judge Friedes' response.

Avram Weisberger
ALJIC

sw

Att.

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OPTIONAL FORM NO. 10
(REV. 7-76)
GSA FPMR (41 CFR) 101-11.6
5010-112

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6
UNITED STATES GOVERNMENT

Memorandum

Dear Paul,
Enclosed are self-explanatory papers. Please see what action the Assn can take in these matters for all of us. Thanks
Jack Friedes

TO : Avram Weisberger, ALJIC

DATE: June 23, 1982

FROM : Jacob Friedes, ALJ

SUBJECT:

With reference to the memorandum dated June 2, 1982 from RCALJ L. Charles Leonard, my schedule of hearings for April 1982 shows that I scheduled 36 hearings for that month of which 11 were postponed and 6 were decided on the record without any hearing. Instead of the 50% postponement rate charged by RCALJ Leonard, the postponement rate was about 30%. Accordingly, RCALJ Leonard's figures of 33 hearings, of which 16 were postponed, are inaccurate.

As usual, RCALJ Leonard begs the question when he asks what is my problem which prevents me from more efficiently and effectively using my time. He asks this question in terms of his standards of a monthly hearings schedule quota of 50 hearings and a new hearing postponement quota (percentage not indicated).

I respectfully submit that RCALJ Leonard's pressure on ALJs to meet these quotas jeopardizes the independence and integrity of the hearing procedure in OHA. The monthly scheduled hearing quota of 50 hearings per month directly affects and reduces the amount of time the ALJ has to devote to each case. The ALJ has many duties, e.g., to ensure that exhibits are properly pulled and marked in evidence, issues are properly framed, the necessary parties have been joined, the necessary expert witnesses, such as vocational expert or medical advisor or aide such as interpreter, have been obtained, claimant has been specifically advised of the need for representation (where claimant is illiterate or non-English speaking or has a severe mental impairment). Also, to review the proposed exhibit file, prepare for the questioning of claimant and expert witnesses, to see what additional documentary evidence is needed, especially medical assessments of claimant's ability to do work-related activities and request same (pre-hearing and post-hearing), determine the necessary duration of the hearing for a complete testimonial record, and ensure a proper decision. Because of the

5010-110

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poor development of cases at initial and reconsideration levels and my staff having responsibility for pre-hearing and post-hearing development without any office assistance in April 1982, my staff spent a great deal of time in development. This was especially true because of my stress on development which I found often determined the outcome of the case. As a result, for approximately the past one and one-half years, I have been hearing cases without any hearing assistant or aide and preparing my own case summaries. Furthermore, most of my hearings have claimant representation and are not of the 20-30 minute vintage but are quite thorough. Finally, I use vocational experts extensively. Compelling me to schedule 50 hearings a month without providing adequate and competent assistance in the aforesaid areas would arbitrarily reduce the amount of time I could devote to these vital duties.

Similarly, pressure on hearing postponement reduction may impel the ALJ to proceed with a hearing where the unrepresented claimant obviously requires representation (as in the above cited examples) or where the attorney has been very recently retained and requests a postponement because he has not had time to prepare or where the attorney has a prior court engagement.

The aforesaid monthly schedule hearing quota and the monthly postponement quota violate claimant's rights to due process of law and a fair hearing as required by the Constitution, Administrative Procedure Act, and the Social Security Act and Regulations. The scheduled monthly hearings quota operates against a claimant because the claimant has been denied twice on the file that comes before the ALJ and unless such file is significantly augmented, usually by documentary evidence such as medical assessments of work-related activities, medical reports, etc., a claimant's claim will probably again be denied. This quota hinders the ALJ from giving each case before him the proper attention it requires. The postponement quota forces the claimant to proceed where he often is not prepared to proceed with his case. This again operates against the claimant. Ultimately, the power to fix a quota for monthly scheduled hearings involves the power to affect or determine the outcome of such hearings by controlling the amount of time the ALJ may give to his cases. Similarly, the power to fix a monthly postponement quota involves the power to affect or determine the outcome of hearings sought to be postponed by compelling unprepared or unfit claimants or their unprepared representatives to proceed with their hearings.

In sum, public trust in the fairness of the Social Security system is at stake. If these quotas are adopted, not only are they legally questionable but they also seriously undermine such public trust.

cc. April 1982 Itinerary & Schedule of Hearings

cc: ALJ Paul H. Teitler
Region II Director
Association of ALJs in USHHS

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Hearings and Appeals

Memorandum

LCL-82-278

Date June 2, 1982

From L. Charles Leonard, RCALJ
OHA - Region II

Subject ALJ Jacob Friedes

To Avram Weisberger, ALJIC
Buffalo OHA

I note that in the month of April, Judge Friedes scheduled only 33 cases. This is substantially below the 50 scheduled cases per Judge that Central Office is pushing for. More seriously, however, is the fact that of the 33 scheduled 16 were postponed. This is almost a 50% postponement rate.

Please talk to Judge Friedes to find out what his problem is which prevents him from more efficiently and effectively using his time. Why does he not schedule 50 cases? Why does he have such a high postponement rate? Please let me know the results of your discussion with Judge Friedes.

Chas.

L. Charles Leonard
Regional Chief Administrative Law Judge
OHA - Region II

jmt

DEPARTMENT OF HEALTH & HUMAN SERVICES
Office of Hearings and Appeals

Memorandum

LCL-82-278

Date June 2, 1982

From L. Charles Leonard, RCALJ
OHA - Region II

Subject ALJ Jacob Friedes

To Avram Weisberger, ALJIC
Buffalo OHA

I note that in the month of April, Judge Friedes scheduled only 33 cases. This is substantially below the 50 scheduled cases per Judge that Central Office is pushing for. More seriously, however, is the fact that of the 33 scheduled 16 were postponed. This is almost a 50% postponement rate.

Please talk to Judge Friedes to find out what his problem is which prevents him from more efficiently and effectively using his time. Why does he not schedule 50 cases? Why does he have such a high postponement rate? Please let me know the results of your discussion with Judge Friedes.

Chas.

L. Charles Leonard
Regional Chief Administrative Law Judge
OHA - Region II

jmt

DEPARTMENT OF HEALTH & HUMAN SERVICES Office of Hearings and Appeals

Memorandum

LCL-82-113

Date March 10, 1982

From L. Charles Leonard, RCALJ
OHA - Region II

Subject Scheduling of Hearings

To All ALJICs

Central Office would like to see every judge schedule a minimum of 50 cases each month. It is felt that this is the only way we can reasonably expect to get a high enough disposition rate to face up to our backlog.

I would like you to review the number of hearings scheduled by all of your judges and see if you can reach a plateau of 50 as a minimum.

I realize that being short support staff has not allowed the extent of scheduling we needed in the past, but with the new staffing allocations this should no longer be the case.

Please try!

Charles Leonard

L. Charles Leonard
Regional Chief Administrative Law Judge
OHA - Region II

jls

CALJ Brown

(From the Office of Hearings & Appeals Handbook -- Organization & Structure)

A-130 OFFICE OF HEARINGS AND APPEALS

The Office of Hearings and Appeals (OHA) is one of the major components of the Social Security Administration. It is directly responsible to the Commissioner of Social Security and, by direct delegation from the Secretary of Health, and Human Services its AC members and ALJs exercise authority relating to the holding of hearings, the issuance of decisions, and the review of decisions under various titles of the Social Security Act and of other Acts of Congress where provided for by such Acts.

OHA actively participates in formulating SSA and DHHS positions with respect to legislation and promulgation of regulations which affect the hearings, appeals, and civil action programs involving OHA. Such legislation may involve the Administrative Procedure Act, the Social Security Act, as well as other Acts.

Hearing offices are located in many major cities throughout the country. The hearings are conducted by Administrative Law Judges and are open to the parties, their attorneys or other appointed representatives, and to such other persons as the ALJ deems necessary and proper. Sworn testimony is received and is recorded verbatim; documentary evidence is admissible; and oral and written arguments may be presented. After a sound record has been established, the ALJ issues a de novo decision. A copy of the decision is mailed to the claimant (and representative, if any) with notice of the right to request review of the ALJ's decision by the Appeals Council within 60 days from the date of receipt of the notice.

The Appeals Council reviews decisions or other actions of the ALJs on its own motion or upon requests of claimants. The Appeals Council members individually dispose of most requests for review. However, on the call of the Chairman, the entire AC may sit en banc. A representative body may be convened to consider policy and procedural questions. Such a representative body shall consist of no less than five members.

Administratively, OHA consists of the Associate Commissioner for Hearings and Appeals; the Office of the Chief Administrative Law Judge; Deputy Associate Commissioner, Program; Deputy Associate Commissioner, Operations; Appeals Council; Equal Opportunity Staff; Executive Secretariat; Office of Appeals Operations; Office of Policy and Procedures; Office of Facilities and Personnel Administration; Office of Field Administration; Office of Appraisal; Office of Management Coordination; and the Offices of the Regional Chief Administrative Law Judges.

A-131 OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE

The Chief Administrative Law Judge (CALJ) who reports directly to the Office of the Associate Commissioner, provides professional leadership to the nationwide corps of administrative law judges, and serves as the focal point of communication between the Associate Commissioner and the ALJs.

ALJs are subject to the administrative direction and supervision of the Associate Commissioner for Hearings and Appeals. The Associate Commissioner's supervisory functions are carried out through the Chief Administrative Law Judge and by the Regional Chief Administrative Law Judges in their respective regions.

The Regional Chief Administrative Law Judges (RCALJs) are the administrative heads of the SSA hearings program for their respective SSA/DHHS regions, and are responsible for planning, directing, and coordinating the total program within their region.

Administrative duties in hearing offices are delegated to an Administrative Law Judge in Charge (ALJIC). (An Administrative Officer (AO) may assist the ALJIC.) The ALJIC assigns cases so as to equalize workloads, minimize travel, etc. The ALJIC specifically is responsible for dividing the HO service territory into travel areas, assigning and detailing the clerical staff, overseeing the screening and assignment of dismissal actions and on-the-record cases for appropriate action, introducing new ALJs to the operations of the HO, monitoring the VE and MA programs, overseeing the maintainance of the time and leave records for the HO personnel, and representing the HO in dealings with the public.

A-132 THE OFFICE OF APPEALS OPERATIONS

The Office of Appeals Operations (OAO), performs the following major functions:

(1) It review ALJs' decisions in order to assist the AC in deciding whether to assume jurisdiction when a request for review is filed, and ultimately drafts the necessary documents to implement the action decided upon by the Council;
(2) It authorizes payment of fees for representation in cases concluded at the Appeals Council level and makes recommendations to the designee of the Associate Commissioner regarding requests for administrative review of fees initially authorized at the Appeals Council level;
(3) It analyzes and recommends action (e.g., to defend on the record, or to request remand) to the Appeals Council in cases appealed to the district courts;
(4) When requested by OGC, it prepares recommendations (for approval by the AC) of memoranda to inform OGC as to whether the AC wishes to appeal orders or decisions issued by the courts; and
(5) It identifies and analyzes problem areas, and recommends improvements in the appeals process.

A-133 OFFICE OF POLICY AND PROCEDURES

The Office of Policy and Procedures (OPP) plans and develops policy and procedures governing the hearings and appeals processes under Titles II, XI, XVI, and XVIII of the Social Security Act, as amended, and Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended.

OPP reviews trends in administrative law, analyzes policy recommendations; develops guidelines for hearing office procedures; and issues OHA Handbook instructions, program directives, etc., to ensure that all operating offices are functioning under uniform procedures. OPP issues informational material and forms related to the hearing and review processes. It provides advice, consultation, and staff assistance to the Associate Commissioner, other OHA Offices, other OHA components, and other Offices on matters involving program policy, procedure, and legal interpretation, both generally and with regard to specific cases coming before the ALJs and the Appeals Council. It handles matters pertaining to the Freedom of Information Act and the Privacy Act. It coordinates OHA policy and procedural matters with other SSA components, OGC, other Departmental components, other Federal agencies, and nongovernmental organizations where appropriate.

A-140 POSITION OF ADMINISTRATIVE LAW JUDGE

The position of the ALJ is unique in the Federal Government. He or she has independence in reaching and making decisions. The ALJ's functions must be performed within the framework of the controlling statutes, particularly section 205(b) of the Social Security Act, as amended; the regulations; appropriate precedents and agency policy; ~~and~~ the delegation of authority from the Secretary.

A-141 APPOINTMENT AND TENURE

ALJs are appointed from ALJ registers established by the Office of Personnel Management (OPM). An ALJ receives an absolute appointment; i.e., the ALJ is not required to serve any probationary period. In this respect, the ALJ's status is different from other civil service employees. It is different also in that the ALJ's compensation, in accordance with the Administrative Procedure Act (5 USC 5362), is prescribed by the OPM independently of agency recommendations or ratings. ALJs are not included in the annual service rating program (applicable to most other civil service employees) for the purpose of measuring and recording efficiency.

With respect to removal of an ALJ, the law provides that an ALJ shall be removed by the agency in which he or she is employed only for good cause established and determined by the OPM on the record after opportunity for hearing. (5 USC 7521).

A-142 NATURE AND SCOPE OF DUTIES

The ALJ has the responsibility of protecting the claimant's interests and rights; and, at the same time, ensuring that benefits are not paid to those who fail to meet the requirements of entitlement.

The ALJ is required to analyze and evaluate the evidence, interpret and apply laws and regulations, elicit testimony from parties and witnesses, make independent decisions, and write clear and accurate statements of fact and law. The ALJ, as trier of the facts, must consider the evidence and render a decision "on the basis of the evidence adduced at the hearing." The ALJ's position is quasi-judicial. He or she must "inquire fully into the matters at issue;" must be objective; and must comply with applicable statutes, regulations, court decisions and rulings. The ALJ is guided by implementing instructions and interpretations from the Agency (OHA).

In the performance of his or her duties, the ALJ must be thoroughly familiar with the Social Security Act, its amendments, the regulations promulgated to administer and interpret the Act, and Social Security Rulings. The ALJ must have specialized knowledge of domestic relations and inheritance laws of the States in the area to which he or she has been assigned. Knowledge in the medical and vocational field is required for decisions in cases under the disability program. The ALJ should also be sufficiently familiar with pertinent provisions of the Internal Revenue Code, IRS regulations, and published Internal Revenue Rulings.

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The ALJ's contacts include those with claimants, other parties, medical and vocational experts, other witnesses, attorneys and nonattorney representatives, State agencies (DDSs), and social security district offices. To the parties who appear before him or her, the ALJ represents the Secretary of Health and Human Services. Thus the ALJ's demeanor, approach, and conduct during hearings can reflect on the Social Security Administration.

A-143 AUTHORITY AND RESPONSIBILITY

The responsibility of ALJs in the Office of Hearings and Appeals is different from that of ALJs in regulatory agencies. In the usual hearing process of a regulatory agency, the presence of counsel for the agency and for the respondent presumptively assures an adequate development of the record by the presentation of the facts and law from the point of view of each party. Through briefs or otherwise, the attention of the ALJ in a regulatory agency is called to pertinent statutory and regulatory provisions and to relevant court decisions. In appeals by individuals under titles II, XI, XVI and XVIII of the Social Security Act and title IV of the Federal Coal Mine Health and Safety Act, the Secretary does not have a representative except in "provider of services" cases.

Hearings are not "adversary" in the usual sense except in provider of services cases, where there are representatives from each side. In all other cases, the ALJ has a responsibility to protect the rights of the claimant, as well as the government, even though the claimant may be represented. The claimant technically has the burden of proof in establishing his or her entitlement to benefits, but the ALJ is ultimately responsible for creating an adequate record. This, of course requires the cooperation of the claimant and representative, if any.

As stated before, ALJs are bound by the Social Security Act, regulations, rulings, and U.S. Supreme Court decisions. A district or circuit court decision is binding only in the specific case. In certain cases, SSA will not appeal a district or circuit decision it disagrees with, because of the limited effect of the decision or for other reasons. SSA is bound by the decision in that particular case, but is not bound by the decision in other similar cases unless it decides to acquiesce by issuing a regulation, ruling, or other policy change.

The Secretary will generally appeal a case where part of the Act or regulations was declared unconstitutional. In the event of such appeal, the ALJs will usually be instructed to withhold action on affected cases, pending the outcome of the appeal.

If a decision of a district court or circuit court establishes certain procedural or evidentiary requirements, ALJs should make every reasonable effort to follow the court's views when handling similar cases in that particular district or circuit. However, if a district court's or circuit court's decision contains interpretations of the law, regulations, or rulings which are inconsistent with the Secretary's interpretations, the ALJs should not consider such requirements binding on future cases. ALJs should continue to follow existing agency policies until such policy is modified by the issuance of a regulation, ruling, or other directive.

A-144 ADMINISTRATIVE DIRECTION AND SUPERVISION

ALJs are subject to the administrative direction and supervision of the Associate Commissioner, Office of Hearings and Appeals. The Associate Commissioner's supervisory functions are carried out through the Chief Administrative Law Judge, and by the Regional Chief Administrative Law Judges in their respective regions.

of the Regulations. The VE should not offer an opinion on issues within the province of the decisionmaker. The decisionmaker must control and direct VE questioning or interrogatories to assure that the VE is not asked to provide an opinion on matters outside of his or her role. It is improper for the VE to:

1. Provide an evaluation of the medical evidence.
2. Establish a claimant's RFC. The parameters of a claimant's potential work capability are to be provided in the form of one or more hypothetical questions. The claimant is offered the right to pose similar questions.
3. State whether the claimant is a proper candidate for vocational rehabilitation.
4. State whether job vacancies exist or whether the claimant would be hired for existing jobs. For example, it would not be appropriate to question a VE as to whether an individual can compete with unimpaired individuals for available employment or whether he or she could perform a particular job as well as an unimpaired individual could. (See sections 404.1566(c) and 416.966(c) of the Regulations.)
5. State whether a claimant can perform in a specific occupation with the same degree of efficiency or productivity as individuals with less severe or no impairments.
6. State whether the claimant is or is not "disabled."

Role of the Administrative Law Judge

In two separate opinions rendered in connection with the Supreme Court's decision in Heckler v. Campbell, some criticism of SSA's hearing process was expressed. Two Justices were concerned that ALJs fulfill their obligation to provide a full and fair inquiry. This duty was characterized as "...a 'basic obligation'...to develop a full and fair record, which obligation rises to a "'special duty...to scrupulously and conscientiously explore for all relevant facts'"...." It was emphasized that this duty is especially pertinent where a claimant is not represented or where the claimant has little education and limited fluency in English. An ALJ's obligation to inquire fully into the matters at issue is specifically mandated by 20 CFR 404.944 and 20 CFR 416.1444. Section 1-610ff of the OHA Handbook discusses hearings where an individual has difficulty with the English language. Sections 1-650ff (in particular, 1-654ff) discuss the ALJ's responsibility to assure that the claimant understands the hearing process and the ALJ's responsibility to inquire fully into the matters at issue.

Attachment

FEBRUARY 23, 1981.

Hon. RICHARD SCHWEIKER,
Secretary of Health and Human Services,
Washington, D.C.

DEAR MR. SECRETARY: Section 304(g) of P.L. 96-265 (The Bellmon Amendment) provides that you, as the Secretary of Health and Human Services, implement a procedure for reviewing a sample of decisions made by Administrative Law Judges (ALJs) in the Office of Hearings and Appeals (OHA). The OHA administers the hearings and appeals process within the Social Security Administration. Through this process, claimants are provided with the opportunity to appeal the determinations unfavorable to them made at the lower levels of the Social Security Administration. The ALJs are qualified lawyers selected by the Office of Personnel Management (formerly the Civil Service Commission) as qualified for such procedures. They are appointed under the provisions of the Administrative Procedures Act, and their judicial independence is provided by that Act as well as personnel regulations.

As an ALJ within the Office of Hearings and Appeals since 1973, with extensive experience as an ALJ, an Administrative Law Judge In Charge of management operations for approximately four years, a past Regional Director of Regions VII and VIII of the Association of Administrative Law Judges in the Department of Health and Human Services, a Co-Plaintiff in a lawsuit filed in the United States District Court for the Western District of Missouri (*Bono et al.* v. *Califano and Trachtenberg et al.*), which was settled in July 1979 by settlement agreement signed by administrative officials agreeing to discontinue complained of management practices that had the effect of infringing on the judicial independence of the ALJs within that office, and in the interests of improving the due process provided to claimants under the provisions of the Social Security Act, I am writing this letter.

At the time of the introduction of the Bellmon Amendment, the parties introducing the Amendment made reference to the decisional process in the OHA as the weakest part of the process, which is costly, time-consuming, slow and inefficient. Concern was also expressed that the increased reversal rate of the ALJs from 39 percent to 52 percent in 1978, and variation on reversal rates among the Judges throughout the country, could be contributing to an increase in claims for disability insurance benefits, and a soaring cost in dollars and cents to the Social Security Trust Fund.

The Social Security Administration has implemented a study of the ALJ decisional process for the stated purpose of, "to ultimately have a system that would result in the Social Security Administration changing its process, so that erroneous ALJ decisions can be identified and corrected, or protested in some appropriate manner."

It is obvious that all involved are, as indeed they should be, concerned with providing a fair hearing process for the claimant, with resultant due process to the claimant and the interests of the Social Security Trust Fund.

While we are aware that the Public Law, which the Bellmon Amendment is a part of, provides as well for the Secretary of Health and Human Services to review 15 percent of the State Agency decisions in 1981, 35 percent in 1982 and 65 percent in subsequent years, and are gratified that such scrutiny is to be applied to the lower levels of determination, we wonder how objective such a study can be.

We are also concerned that the planned study of the ALJ decisional process, in its present form and as being carried out by the Social Security Administration, cannot present meaningful results as it is constituted to ignore essential information that only the ALJ corps can provide.

The true intent of the Bellmon Amendment should be to identify the problems in the entire process of decision-making at the ALJ level, which includes the role that management, policies, budget considerations, caseload and law changes have caused. In order to obtain that information it is essential that meaningful information be obtained from the ALJs themselves, who are in the best position to know what has been happening. Illustrative of that point and its importance is the fact that while many ALJs have been upset for some time with the errors of development, law, and regulation application at the lower levels of decision-making in the Social Security Administration, they have been instructed not to criticize or make derogatory remarks in their decisions with respect to mistakes made at the lower levels. A review of their decisions, therefore, will not be meaningful as they cannot reflect the errors upon which the ALJ has, in many cases, predicated the reversal of the lower determination decision.

Nowhere in the presently published plans for review of the decision-making process is any mention made that such factors will be considered, and there are no indications that the ALJs will ever be allowed the opportunity to have the substantial input they should have by reason of their position in any plans for change in the system.

The ALJs in the Office of Hearings and Appeals have, for many years, been concerned with the decisional process within the Social Security Administration. They have voiced fears and given evidence to the fact that decisional independence, due process and the interests of the Trust Fund have become victims of a mounting management efficiency program dedicated more to numbers than to justice. The crisis in the hearings and appeals process was documented for all to see in the Survey and Issue Paper of the Staff of the Subcommittee of the Social Security Committee of the House Ways and Means Committee (96th Congress, First Session, Committee Print WMCP:96-2 "Social Security Administrative Law Judges; Survey and Issue Paper").

The management of the Social Security Administration, prompted by mounting criticism of the delay in the processing of claims and increased applications for benefits, adopted and implemented management initiatives that were primarily dedicated to the ultimate goal of decreasing the numbers of cases outstanding, rather than insuring fair disposition of the cases. Management by numbers is reflected by the above report to be a cause of the declining quality of justice concluded by that report. The ALJs in the Office of Hearings and Appeals, as judicial officials, were the only ones whose official duty it was to safeguard the fairness of the hearing process by reason of their being lawyers and judges sworn to uphold the law and protect the due process system. They are pitted against administrative management officials who have no such constraint. The result was predictable—the quantity won out over the quality, and the entire ALJ process now is criticized as being the weakest part of the system.

In January, 1979, the Staff of the Subcommittee on Social Security concluded in its report: "The Subcommittee staff believes that because of the great increase in hearing requests in the last four years, the greater emphasis in all phases of the process has been placed on moving the cases rather than rendering fair and sound decisions. Up to now in BHA's continuing struggle to achieve a balance between quantity and quality, the definite answer has been quantity . . ."

It will be no surprise, therefore, if, as a result of the Bellmon Amendment study, the decisions of the ALJs reflect a significant failing in soundness, clarity, and an inference is asserted by the Social Security Administration that it is the ALJ process that must be changed, when it, in fact, is the only true safeguard between the tyranny of numbers and the rights of the claimants.

Certain ALJs in the Office of Hearings and Appeals are firmly convinced that a private meeting with you would be extremely valuable so that your report to Congress and/or recommendations that you may make to correct the problems that concern Congress will be complete and containing all facets of the problem.

To that end, Judge Robert Hermann recently attempted to arrange a meeting with you whereby he and seven other leaders of the ALJ corps could meet with you to convey the concerns and information that they possess. Unfortunately, although originally scheduded, the meeting for unknown reasons, has been cancelled. In the interest of your being informed as to much of the information we would like to have presented to you in person, I am writing this letter to outline at least my impressions as I would have conveyed them to you had the meeting taken place.

In spite of the conclusions reached in the staff committee report the settlement of the Kansas litigation whereby management agreed to discontinue questioned management practices; the changing of the Associate Commissioner and Deputy Associate Commissioners whose management initiatives were objected to; and promises of the new Associate Commissioner and management officials to abide by the terms of the Kansas City litigation settlement, extreme difficulties continue to exist in the Office of Hearings and Appeals that are adversely affecting the ability of the ALJs to render due process to the claimants and to the Trust Fund:

I. State Agencies are continuing to exert extreme pressure for the processing of more and more cases, without regard to the necessity and requirement that such cases be properly developed so that all available evidence is in fairness considered at the initial and reconsideration determination levels.

II. Denial rates at the reconsideration determination level have increased from 40 percent to 80 percent with consequent increase in the Requests for Hearings and a greater burden being placed on the ALJ hearing level, which is further encumbered by the incompleteness of the evidentiary picture presented by the lower determination levels.

III. The Social Security Administration, at the lower levels of determination, i.e., initial determination and reconsideration determination, have instituted policies to accelerate the speed of the processing of their claims with resultant failure of those lower levels to adequately gather the evidence to insure the claimant of fair consideration at that level. This has resulted in the evidentiary development responsibility being "dumped" on the ALJ level, which does not have the staff to perform such developmental tasks and accelerated numbers of cases that reach the hearing level permaturely and without a sufficient record. On last report, the denial rate of claims at the reconsideration level had increased from 40 percent to 82 percent. If this trend continues a serious question is posed as to the necessity of keeping this second level of determination.

IV. The escalating numbers of Requests for Hearings, caused by these practices at the lower levels is increasing the work responsibility to demand of the ALJs higher and higher rates of production. It was recently reported the caseload of the OHA had reached 119,000 cases. There are approximately 650 ALJs to accomplish this task. Management officials of the OHA, in order to attempt to keep up with the increased caseload have failed to meaningfully implement the stipulated agreement reached in the Kansas City litigation, and have allowed practices to continue in the field that lead to quota and goal setting that are to continuing adversely affect the ALJs ability to fully and fairly develop the facts of the case, hold hearings and fully deliberate to make a decision, i.e.:

A. Quotas in numbers of dispositions to be issued each month are being applied to professional staff members assigned to the ALJs.

1. The Staff Attorney program, designed and instituted to assist the ALJs in decisional output increase has deteriorated to the point that the Staff Attorneys assigned to the ALJs are now being evaluated for performance on the basis of arbitary quotas in numbers of decisions per month. Although no standard of performance is officially adopted by either the employing agency or agreed to by the Staff Attorneys who are professional employees, the variable quotas of national averages are being continuously applied in judgement of the Staff Attorneys and for that matter, in determinations as to whether or not the Staff Attorney program should be continued.

B. Supervision and control authority of clericals and professional staff members in the field offices is being removed from the ALJs by implementation of Office Reconfiguration plans strenously opposd by the ALJ Association.

1. The supervisory authority of the ALJs over their professional staff is being negated by super-impostition of ALJIC (the Administration Law Judge In Charge of the office) supervision in each office, to the extent that administrative directives published and management policies of OHA place on the ALJIC the over-all supervisory responsibility for the quality of work done by each and every employee in the office, rather than the ALJ who should be the person responsibile for the management and direct supervision of the staff assigned to him for performance of his duties.

2. The unit concept, which provided for assignment of clerical and professional staff to the individual ALJs for their immediate supervision to assist them in the performance of their sworn duties in development of the cases for hearing, is being phased out by management officials with alleged office reconfiguration plans, in spite of clear voiced opposition of the ALJs and union officials. These plans for reorganization of the field offices will result in pooling of the clerical and professional staff and put all field office personnel under the supervision and control of non-ALJ management officials.

C. Administrators in Central Office management, by policy and memorandum are suggesting to the ALJs that they continue to use "short form" decisional formats, which have been established by their own studies to be defective in significant numbers in that they are not fully informative of the basis of decision and are not in accordance with the requirements of the Administrative Procedures Act.

1. The practice of preparing "short form" decisions was permitted in cases where benefits were allowed but denied where benefits were denied. The result is, it is easier for the ALJs to prepare decisions of allowances than to prepare decisions of denial. Management discontinued the practice of "own motion review" of cases that were allowed by the Appeals Council except in cases of protest by the Bureau of Disability Insurance. Any defects in the "short form" reversal process, occasioned by the speed and pressures for increased production, therefore, went unheeded, and more importantly, went uncorrected.

D. Regional Chief Judges, with the concurrence of the Chief Judge and Deputy Chief Judge, are setting minimum numbers of cases to be heard by ALJs in a week's period of time as a requirement to be met before travel authorization is granted to the ALJs for the purpose of hearing cases, without regard to the nature of the cases or the individual problems involved in each case.

E. Reversal and affirmation rates, as well as decisional output and hearings held records of individual ALJs are being maintained on a monthly basis and reported throughout the nation to individuals who do not have the legal right to know, and for purposes of identifying "aberrational judges" and ranking of said ALJs for disciplining and/or corrective action, all in violation of the prohibitions of the Administrative Procedures Act.

1. Regional office and Central Office components have continued to track and publish individual judges' decisional output as well as reversal and affirmation rates, and computed national averages naming the judges according to such affirmation and reversal figures.

F. By policy and position description, Central Office management has established Regional Chief Judge and Administrative Law Judge in Charge positions that by description are delegated authority to supervise and direct individual ALJs in their judicial positions in order than matters of general office mangement and such positions are in contradiction to the official Position Descriptions of the individual ALJs which specifically exempts them from such supervisory control in their judicial functions.

1. Management has effectuated official Position Descriptions granting authority to Regional Chief Judges which state that they are the supervisors of the substantive and procedural quality of the ALJs decisions. This places upon the Regional Chief Judge an obligation to rate and evaluate the performance of individual ALJs in their general job performance. This is in direct contradiction and violative of the provisions of the Administrative Procedures Act. If complied with, interference with decisional independence predictably can, will, and has resulted.

2. Administrative management officials have continued to publish administrative directives handbook memorandum and memorandum placing ALJICs in a "judicial mangement position wher they are required to counsel and supervise ALJs in their office towards the increasing of their production and correcting their errors." If complied with, total interference with decisional independence predictably can and will occur.

G. Central Office and Regional Office management continues and maintains policies which permit assignment or removal of staff and equipment from ALJs on artificial, arbitrary unofficial standards of production based upon continually changing national averages and staff support ratios of incomparable units with adverse effect upon the ability of the ALJs to fulfill the responsibilities of their positions.

H. In order to implement the burgeoning structure of administrative control over the ALJs judicial functions, whereas it was only general office management conrol originally, the numbers of administrative personnel have increased dramatically. More and more non-professional employees are being elevated to high grade management positions and placed in Regional Offices throughout the country as well as in Central Office. Such management positions are dividing and redividing to envelop each and every judicial activity of the ALJs as well as their nonjudicial functions. With the creation of each and every new position, a need to exist for that position requires the individual placed in that position to attempt to affect the individual ALJs, either by requesting additional reports of what the Judges are doing, or status reports of individual cases with a multiplicity of Ex parte communications with the ALJs which are not only time-consuming and wasteful, but extremely questionable in their propriety. There are more and more people to tell less and less people how to do the work of the Office of Hearings and Appeals and accomplish its mission.

The effects of the above continued practices of administrative management on the ability of the ALJs to handle the increasing workload has been adverse.

The rising cost of the operating budget in the OHA is in part due to this unnecessary increase in administrative interference with the ALJs performance of duty. For example, the staff in Central Office has increased from 699 in 1974 to 933 in 1979. While field office support personnel is reported to have increased from 1,637 in 1975 to 2,643 in 1979, a great part of that increase is due to the increase in size of the staffs of Regional Offices and distribution of high grade GS positions to those offices to handle the increased demands of an ever increasing overview of judicial activities of the ALJs. The increase in operating budget in OHA from 97 million dollars to 130 million dollars is in a significant part, due to an increasing layering of administrative management positions, and less and less to the addition of actual clerical and professional staff to do the work, and provide timely hearings to the claimants.

The problem of over-burgeoning growth of unneeded administrative management intruding upon the judicial functions of the ALJs, was brought to the attention of former Commissioner of social Security, Stanford Ross, by a group of concerned ALJs in a meeting with him in 1979. In response to the expression of our concerns, he appointed a task force to study the problem, which consisted in part of Central Office management officials, who reported that the Regional Chief Judges offices were not in conformity and not as effective as they should be, but contrary to the recommendations of the ALJs, instead of decreasing the size of the Regional Offices' staff and authority to interfere with judicial activities of the ALJs, they recommended an increase in power, authority and positions of management in those Regional Offices.

The entire picture of problems presented above can only illustrate, what happens when increased demands to hold more and more hearings are the administrative responsibility of non-ALJs and non-professional staff that have no familiarity with the field problems and the judicial requirements of the mission of OHA. The response of those administrators has been predictable. They apply whatever non-judicial methods they can to encourage increased production. Ultimately, they must of necessity interfere with the Judges in the performance of their duties.

The problem will only continue unless drastic changes in the management structure of the Office of Hearings and Appeals are made so that the primary goal of the office is to provide fair hearings to the claimants rather than faster and more numerous ones. This cannot be done unless the ALJs are free to do their duties without interference. Management will never stop doing what they have been doing as outlined above so long as management is controlled by the Social Security Administration and non-lawyer, non-judicial, or non-professional employees who cannot appreciate the importance of the requirements of due process.

Reform in management has been attempted. Indeed, litigation resulted in promises of management to refrain from much of what was complained of before. By reason of the arrangement of the system, these problems cannot stop. The same abuses will occur again and again. Each time the workload increases for the Social Security Administration and the Office of Hearings and Appeals, the interplay of management policies of production standards will transfer back and forth between an administrative system to the quasi-judicial system with inappropriate result. This will occur as long as the Office of Hearings and Appeals is within the Social Security Administration. Quotas are applied at the lower levels of determination in the Social Security Administration, but that does not mean they are proper or should be placed on a judicial system just because they help increase the numbers disposed of in determinations.

The only answer is the separation of the ALJ corps from the Social Security Administration and the placing of authority to provide due process to the claimants at the hearing levels in the hands of the ALJs and removal of such authority from administrators of the Social Security Administration.

RECOMMENDATIONS

Based upon the above and my experience as an ALJ in the Office of Hearings and Appeals since 1973, I would like to submit the following recommendations for your consideration.

I. Remove the Office of Hearings and Appeals and the ALJs from the employment of the Social Security Administration, and place them in the Office of the Secretary of Health and Human Services as employees of the Secretary;

II. Provide hearings before ALJs for purposes of matters under the jurisdiction of the Secretary, be adversary in nature with legal representation of government and private citizen interests;

III. Grant full remand and directive authority to ALJs so that they may remand cases to the appropriate agency levels for correcting.

IV. Provide that decisions of the ALJs will be final and appealable on Certiorari basis only. The Appeals Council, an appellate group consisting of a limited number of members of 12, with numerous lay assistants, cannot possibly handle their own motion review duties of approximately 700 ALJs. These ALJs are now now producing as many as three times the number of cases monthly as they had done before when the Appeals Council was orginally constituted. The operational analysis report of OHA reflects the same Appeals Council processed appeals from 51,000 denials in one year. Each Appeals Council member, therefore, had a docket of approximately 4,200 cases to dispose of, or 350 per month. If the allowances (numbering approximately 111,000 in 1979, according to OHA Fact Sheet) were also added to the own motion review requirement of the Appeals Council, the number would be increased to the astronomical number of those 12 men being responsible for the appellate review of 13,000 cases each for the year, or over 1,000 cases per month. Appeals Council review can no longer be effective and, therefore, should be discontinued.

In conclusion and summary, it is obvious that the crisis in the Office of Hearings and Appeals is caused by the increasing demands for more and more hearings occasioned by increasing denial rates at the lower levels of the determinative levels of the Social Security Administration. In efforts to stem this tide of increasing receipts, the administrators have perceived the answer to be more and more management, pressures for production and interference with the judicial functions of the ALJs to make them put out more work and decide more cases. To a certain extent, those management pressures have increased the output of the ALJs, but the manner in which such increase has ben accomplished has allowed encroachment of management on the judicial functions of the ALJs, made it easier to allow claims than to deny them, by way of "short form" decisions, and create the general over-all impression that the quality of due process in the Office of Hearings and Appeals has decreased with consequent disillusionment in the fairness of the system to both the claimant and the interest of the Trust Fund and the Taxpayers.

If more detailed discussion of the particulars of this letter or documentation is needed, I would be glad to supply whatever information I have upon your request and at the appropriate time.

Thank you for your consideration of this matter.

Sincerely yours,

CHARLES BONO,
Administrative Law Judge,
Kansas City, Mo., Field Office.

Excerpts from plaintiff's brief, Lopez v Schweicker
U.S. District Court, Central District of
California, June 6, 1983.

B. The SSA's Refusal To Follow The Rulings Of The Circuit Courts Violates The Separation Of Powers Doctrine Inherent In The United States Constitution

The Social Security Administration as an agency of the executive branch must follow the law as interpreted by the federal courts. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). In Marbury the Secretary of State of a successor administration was required to deliver the commission to which a lame duck appointee was lawfully entitled. In this historic decision Chief Justice John Marshall set the standard by which all succeeding courts would deal with the issue of separation of powers: "It is, emphatically, the province and duty of the judicial department, to say what the law is." Id., at 177.

One hundred eighty years later the U.S. Supreme Court reaffirmed this principle in U.S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). In analyzing this issue the court noted that the authority of the executive branch must be viewed "in light of our historic commitment to the rule of law." Id., 418 U.S. at 708. The court found that once a subpoena duces

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> Philbrook v. Glodgett, 421 U.S. 707, 720-722 95 S. Ct. 1893, 44 L. Ed 2d. 525. (1975). Repetitious litigation will thus not be necessary in order to establish a general legal principle applicable beyond the confines of a particular case. Stare decisis will impel the Secretary to follow statutory or constitutional decisions within the jurisdiction of the courts that have rendered them.

Brief for the Petitioner (Secretary of Health and Human Services) at 68-69, Califano v. Yamasaki, supra (emphasis added).

tecum was issued by a federal court even the president must comply. Chief Justice Burger wrote:

> [T]he 'Judicial Power of the United States' vested in the federal courts by Art. III, §1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.... We therefore reaffirm that it is the province and duty of this Court 'to say what the law is.... Id., at 704, 705.

The concept of Separation of Powers created by articles I, II and III, is inherent in our constitutional system of government. In U.S. v. Nixon supra, at 707, the Court explained the contours of this constitutional principle:

> In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. 'While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its

> branches separateness but interdependence, autonomy but reciprocity.' Youngstown Sheet and Tube Co. v. Sawyer (1952) 343 U.S. at 635, [72 S. Ct. 863, 96 L. Ed. 2d 1153] (Jacksons v. concurring)

Attempts to limit this constitutional doctrine have been repeatedly rebuffed. Thus, in Youngstown Sheet and Tube Co. v. Sawyer, supra, the Supreme Court found that the President's seizure and condemnation of certain steel plants was an unlawful extension of presidential powers as defined by Article II of the U.S. Constitution. In his concurring opinion, the reasoning of which was adopted by the Court in U.S. v. Nixon, supra, Justice Jackson observed, "[w]ith all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under law...." Youngstown Sheet and Tube Co. v. Sawyer,supra, 343 U.S. at 655 (Jackson, J., concurring).

Courts will, and should, give deference to the interpretation of a statute by its administering agency. International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 565-66, 99 S.Ct. 790, 58 L. Ed. 2d 808 (1979); SEC v. Sloan, 436 U.S. 103, 118-19, 98 S.Ct. 1702, 56 L. Ed. 2d 148 (1978). However, in the present case the Secretary is not asking for deference. Rather, he is specifically refusing to follow judicial interpretations with which he disagrees. This is clearly contrary to the constitution. "The courts are the final authorities in issues of statutory construction." Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261,

272, 88 S.Ct. 929, 935, 19 L. Ed. 2d 1090 (1968) amended, 392 U.S. 901, 88 S. Ct. 2049, 20 L. Ed. 2d 1361 (1968); Marbury v. Madison, supra; Safir v. Gibson, 417 F.2d 972, 976 (2d Cir. 1969), cert. denied, 400 U.S. 850, 91 S.Ct. 57, 27 L. Ed. 2d 88 (1970).

Federal courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, supra 390 U.S. at 272, quoting NLRB v. Brown, 380 U.S. 278, 291, 85 S. Ct. 980, 13 L. Ed. 2d 839 (1965). The courts have determined what the congressional intent is in the cases which the Secretary is refusing to follow. Yet the Secretary continues to "nonacquiesce." [10] "The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia...." Volkswagenwerk, supra, at 272, quoting American Ship Building Co. v. N.L.R.B., 380 U.S. 300, 318, 85 S. Ct. 955, 13 L. Ed. 2d 855

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[10] One of the main reasons given for SSA's "non-acquiescence" in Finnegan is that "SSA would face problems in complying with the court's order...." (See Memo of Sandy Crank, Exhibit G at 2.) The government chose not to appeal and to ignore "the holding of the Ninth Circuit ..." in order "attempt to argue this issue again." (Memo of Sandy Crank, Exhibit G at 3.) Similarly, in Ramirez v. Schweiker, No. CV 81-2693 IH(M) (C.D. Cal) the court ordered the Secretary to follow Patti v. Schweiker. The order of the appeals council, however, says that while Patti will be followed, (See, Order of Remand, together with SSA Appeals Council Order of Remand, Exhibit I.) "the administrative law judge shall be guided by the provisions of Social Security Ruling 81-6, which sets forth the appropriate ruling for determining whether 'disability' has ceased." Id. But SSR 81-6, (Exhibit D) was repudiated by the Ninth Circuit's ruling in Patti. It, in clear contravention to Patti, does not require a showing of "medical improvement" prior to cessation of benefits.

(1965). "[U]nless we wish anarchy to prevail within the federal judicial system, precedent of this Court must be followed by the lower courts no matter how misguided the judges of those courts may think it to be...." *Hutto v. Davis*, 454 U.S. 370, 102 S.Ct. 703, 705, 70 L. Ed. 2d 556 (1982) (per curiam), *reh. denied*, 455 U.S. 1038, 102 S. Ct. 1742, 72 L. Ed. 2d 156 (1982).

The Secretary's refusal to follow the law as interpreted by the courts is an attack on the most basic premise of our legal system and cannot be allowed. He must be compelled to operate within our constitutional structure. He must follow the laws created by the legislative branch as construed by the judiciary.

C. *Courts Have Repeatedly Rejected The Bold Claim Of Defendants That They Can Refuse To Acquiesce In Circuit Court Decisions*

The courts which have dealt with agency refusals to follow judicial precedent have applied both Article III and common law *stare decisis* in their condemnation of such agency lawlessness.[11]

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[11] Courts have also referred to the principles of collateral estoppel and *res judicata* in condemning a refusal to follow judicial precedent. This appears to be the result of confusion arising from the fact that separation of powers, *stare decisis*, collateral estoppel and *res judicata* all represent expressions of the same fundamental policy, namely, that it is the function of the courts to decide disputed questions of law and that the courts' decision on such disputes are binding on all lower courts until and unless they are overruled or until and unless the people, acting through the legislative branch change the law. Discussion in this brief will refer to this principle in terms of separation of powers and *stare decisis* as these doctrines represent the more general expressions of the policy. It should be noted, however, that many cases applying the same principle may refer to the doctrine of *res judicata* and collateral estoppel as well. *See*, for example, *Barretto v.*

1. Administrative Agencies Are Bound By The Law Of The Circuit

In Ithaca College v. N.L.R.B., 623 F.2d 224 (2nd Cir. 1980), cert. denied, 449 U.S. 975, 101 S.Ct. 386, 66 L. Ed. 2d 237 (1980) the National Labor Relations Board took the position, as does SSA in the present case, that it need not follow court of appeals precedent. The NLRB expressly chose to ignore a prior decision of the Second Circuit by claiming that it was not bound by it. The Second Circuit disagreed relying upon a wide spectrum of authority.

> The position of the Board is one in which we cannot acquiesce. While deference is to be given to an agency's interpretation of the statute it administers, [citations omitted] it is the courts that have the final word on matters of statutory interpretation. [Citations omitted.] 'The position of any administrative tribunal whose hearings, findings, conclusions and orders are subject to direct judicial review is much akin to that of a

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United States, 694 F.2d 603, 605-608 (9th Cir. 1982), and Benko v. Schweiker, 551 F.Supp. 698, 701-702 (D.N.H. 1982). Indeed the theory of "res judicata" was used in Lyle v. Secretary HHS, 700 F. 2d 566, (9th Cir. 1983) with respect to the binding and controlling effect of Patti.

> United States District Court,' [Citation omitted], and as must a district court, an agency is bound to follow the law of the Circuit. [Citations omitted.] Id., at 228-29. (Emphasis added)

Similarly, in Allegheny General Hospital v. N.L.R.B., 608 F.2d 965 (3rd Cir. 1979) the NLRB did not follow two earlier cases, neither of which had been appealed. In finding the NLRB's action unlawful the court stated: "The essence of the common law doctrine of precedent or stare decisis is that the rule of the case creates a binding legal precept." Id., at 969. The court reasoned that "[a] judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy." Id., at 969-970. Agencies, therefore, are not free simply to create their own precedent. "Congress has not given to the NLRB the power or authority to disagree, respectfully or otherwise, with decisions of this court. [Citations omited] For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law." Id., at 970. (Emphasis Added) The court ruled that:

> A decision by this court, not overruled by the United States Supreme Court, is a decision of the court of last resort in this federal judicial circuit. Thus our judgments ... are binding on all inferior courts and

> litigants in the Third Judicial Circuit, and also on administrative agencies when they deal with matters pertaining thereto. *Id.*, at 700.

The SSA in following this "nonacquiescence" policy is operating outside the law. It is noteworthy that the SSA, while disagreeing with the precedents of *Patti*, *Finnegan* and other cases, has not appealed them to the U.S. Supreme Court. As noted by the court haca *College v. NLRB*, *supra*, at 228-229:

> When [The Board] disagrees in a particular case,it should seek review in the Supreme Court. During the interim before it has sought review or while review is still pending, it would be reasonable for the Board to stay its proceedings in another case that arguably falls within the precedent of the first one. However, the Board cannot, as it did here, choose to ignore the decision as if it had no force or effect.

2. The Courts Have Consistently Rejected SSA's Policy Of "Nonacquiescence" When the Issue Has Been Raised

SSA's policy of "nonacquiescence " has been rejected in a number of cases involving the agency's refusal to follow precedent.

In *Hillhouse v. Harris*, 547 F.Supp. 88 (W.D. Ark. 1982) the Secretary chose to ignore clear rulings of the Eighth Circuit and instead attempted to follow the law of other circuits. In that action the Administrative Law Judge followed the proper precedent but on appeal to the Appeals Council, the Secretary chose to ignore the precedent and follow his own inclinations. The court ruled that "the regulations of HHS are not the supreme law of the land. 'It is, emphatically, the province and duty of the judicial department, to say what the law is,' Marbury v. Madison, 1 Cranch 137, 177, 2 L. Ed. 60 (1803), and the Secretary will ignore that principle at his peril." Id., at 93.

In Hollingsworth v. Schweiker, No. N81-0035C (E.D. Mo. 1983) (Exhibit J), the court stated in ruling on the Secretary's claim of exemption from the law that "[t]he judgment of the court of appeals is binding on all inferior courts and litigants within the jurisdiction of the Eighth Circuit, including an administrative agency such as the present defendant."

In a class action almost identical to the instant case involving the Secretary's refusal to follow Finnegan v. Mathews in the state of Washington, Judge Rothstein found the Secretary's actions to be contrary to the law:

> Reduced to its essence, the Secretary's argument is that his department, in spite of the Finnegan decision, should be allowed to make initial determinations of the continuing eligibility for SSI benefits of grandfatherees. This court finds that Finnegan controls. The SSA must follow the Ninth Circuit's decision within this jurisdiction. Jones & Laughlin Steel v. Marshall, 636 F.2d 32 (3d Cir. 1980); ITT World Communications

v. FCC, 635 F.2d 32 (2d Cir. 1980); *Mary Thompson Hospital v. NLRB*, 621 F.2d 858 (7th Cir. 1980).

Siedlecki v. Schweiker, No. C 82-61R (W.D. Wash. 1983) Judgment, Temporary Restraining Order and Order. (Exhibits K, p. 11, L, and M.)

Similarly, in *Chee v. Schweiker*, No. Civ. 82-693-PCT-VAC (D.C. Ariz. 1982) (Exhibit N), Judge Cordova ruled that the Secretary's "publication of a ruling of nonacquiescence in the *Finnegan* decision is contrary to law and is of no force or effect. Defendant must abide by the decisions of the courts of the district and circuit in which a claimant resides, and cannot avoid them by statements of nonacquiescence." *Id.*, at p. 1 [12]

In an earlier case, *Flores v. Secretary of H.E.W.*, 228 F.Supp. 877 (D.P.R. 1964), infant plaintiffs sued the Secretary of HEW in the district court for review of an administrative decision denying children's benefits. The administrative hearing examiner had refused to follow two favorable court decisions with identical facts, and insisted on following an unfavorable district court ruling that had been distinguished in one of the favorable rulings. The court noted that "[i]f the agency is dissatisfied with any ruling or decision of this Court, it should seek its reversal or modification by the legal media provided by our laws for the review thereof." Id., at 878. It went even further to state: "[a]bsent any such reversal or modification, the refusal or failure to follow such decisions in future cases appears to be contemptuous." Id. (Emphasis added.) Plaintiffs could not agree more.

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[12] Even more recently, in a class action in Washington state, *Morrison v. Schweiker*, (E.D. Wash.) No. 82-888V, the District Court found that nonacquiescence to the *Patti* decision, was unlawful. A copy with this decision will be provided as soon as obtained.

SSA's policy of nonacquiescence is patently contrary to both the constitution and the theory of *stare decisis*. This court should rule it to be unlawful.

VI

NONACQUIESCENCE VIOLATES SSI AND SSDI CLAIMANTS' RIGHTS TO DUE PROCESS

A. Plaintiffs Have A Protected Interest In Having Their Claims Fairly Adjudicated

Applicants and recipients of public benefits have a protected interest in having their claims fairly adjudicated. E.g., Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L. Ed. 2d 18 (1976) (disability benefits); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 25 L. Ed. 2d 287 (1970) (welfare benefits). Once it is recognized that the interest involved is protected by the Due Process Clause of the Fifth Amendment of the United States Constitution, the inquiry turns to the question of what process is due. Logan v. Zimmerman Brush Company, 455 U.S.422, 102 S.Ct. 1148, 1154 71 L. Ed. 2d 265 (1982).

B. Nonacquiescence Denies Plaintiffs A Meaningful Opportunity To Be Heard

"[T]he right to due process reflects a fundamental value in our American constitutional system." Boddie v. Connecticut, 401 U.S. 371, 374, 91 S.Ct. 780, 784, 28 L. Ed. 2d 113 (1971) (Harlan, J.). It guarantees, at a minimum, that an individual faced with loss or denial of a protected interest be given a meaningful opportunity to be heard. Id., at 377, 91 S.Ct. at 785; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L. Ed. 865 (1950). The Secretary's policy of nonacquiescence denies plaintiffs' right to a meaningful opportunity to be heard.

In a due process hearing it is an "elementary requirement" that "the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing." Goldberg v. Kelly, supra, at 271, 90 S. Ct. 1022 (Emphasis added), citing Ohio Bell Tel. Co. v. PUC, 301 U.S. 292, 57 S.Ct. 724, 81 L. Ed. 1093 (1937); United States v. Abilene & S.R. Co., 265 U.S. 274, 288-289, 44 S.Ct. 565, 569-570, 68 L. Ed. 1016 (1924).

When the Secretary nonacquiesces, and directs DDS personnel and administrative law judges to apply standards and rules contrary to binding precedents within the relevant jurisdiction, he denies claimants who would be benefited by the precedents their right to have their eligibility determined pursuant to the appropriate legal rules. Those rules, under our system of government, are determined by the courts. Allegheny General

Hospital v. NLRB, supra at 970 (when administrative agencies predicate rulings based upon their disagreement with binding precedent, they "operate outside the law."); accord, Ithaca College v. NLRB, supra at 229. The "elementary requirement" (Goldberg v. Kelly, supra, at 271, 90 S.Ct. at 1022) that the decision be based on the law has not been met when the Secretary nonacquiesces in a relevant binding precedent. [13]

Nonacquiescence rulings deprive plaintiffs of an opportunity to establish facts or circumstances which may be crucial in establishing their eligibility for SSDI and SSI. It is irrelevant that a hearing takes place, if the decision maker is precluded from applying the correct rule of law. This principle is illustrated in the Court's decision in Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L. Ed. 2d 90 (1971). Bell involved a state financial responsibility law which provided that, upon receipt of an accident report claiming liability against an uninsured motorist, the uninsured motorist would have his license suspended unless he posted security to cover the amount of damages claimed. Id., at 535-536, 91 S.Ct. at 1587. The statutory scheme provided for a pre-suspension hearing, which Bell -- the uninsured motorist -- attended. At the hearing, however, Bell was instructed by the hearing officer that he would not consider any evidence on the issue of Bell's liability towards the other motorist. Id., at 537-38, 91 S.Ct. at 1588-89.

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[13] In Goldberg v. Kelly, supra, the seminal case concerning due process rights in the context of public benefits, the Court also held that "an impartial decision maker is essential." Id., at 271, 90 S. Ct. at 1022. The purpose of nonacquiescence rulings is to direct DDS personnel and administrative law judges in their decision making function. SSA takes the position that nonacquiescence rulings are binding upon all administrative law judges. See, Memorandum of Louis B. Hays, Associate Commissioner, Office of Hearings and Appeals, February 23, 1982: "Social Security Ruling SSR 82-10c [nonacquiescing in Finnegan v. Mathews, 641 F.2d 1340 (1981)] is binding on all components of SSA including administrative law judges and the Appeals Council (20 CFR 422.408)." Exhibit O. This memorandum was sent to all administrative law judges nationwide, and specified that the nonacquiescence policy was to be followed in all cases, "including cases involving claimants who reside within the jurisdiction of the United States Court of Appeals for the Ninth Circuit." Ibid. Plaintiffs submit that when an administrative agency asserts authority over a decision maker, and directs that decision maker to ignore binding precedents setting forth the appropriate legal rules, it has deprived claimants of an impartial decision maker.

The Court held that this scheme violated Bell's right to due process. Id., at 541-542, 91 S.Ct. 1590, 1591. Fatal to the statute was the fact that it made liability an important factor in the decision to suspend licenses, but provided no opportunity for Bell to address that issue at his prior hearing:

> The hearing required by the Due Process Clause must be 'meaningful' Armstrong v. Manzo, 380 U.S. 545, 552, [85 S.Ct. 1187, 1191, 14 L.Ed. 62] (1965), and 'appropriate to the nature of the case.' Mullane v. Central Hanover Bank & Trust Co., [339 U.S. 306,] 313, 70 S.Ct. at 657. It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision ... does not meet the standard.

Id., at 541-542, 91 S.Ct. at 1591.

The nature of the due process violation caused by the Secretary's nonacquiescence policy is illustrated by reference to

Patti v. Schweiker, supra, one of the cases to which the Secretary has formally nonacquiesced. In Patti, the Ninth Circuit held that once a claimant has been found disabled, a presumption of continuing disability is created and benefits can be terminated only where there is evidence of medical improvement. Id., at 587. Like the issue of liability under the financial responsibility law considered in Bell, Patti establishes "medical improvement" as an essential element in determining a claimant's continued eligibility for SSDI. The Secretary's policy of nonacquiescence, however, prohibits consideration of any evidence on this issue at the initial and reconsideration stage before DDS, at the administrative hearing, and at the Appeals Council level. [14] As the Court stated in Bell, supra, at 542, 91 S.Ct. at 1591, it "hardly seems to need explication" that such a hearing is not meaningful, and denies the claimant's right to due process.

C. The Right To Appeal To Federal District Court Does Not Cure The Due Process Violation At The Administrative Level

The due process violation resulting from nonacquiescence is not cured because a claimant, by pursuing his remedies all the way to federal district court, can eventually have the correct rule of law applied. "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly, supra, at 268-269, 90 S.Ct. at 1021. A scheme which randomly requires certain claimants to pursue a long and fruitless path of administrative procedures before having their claims heard on the merits, for the first time, in a federal district court is not "appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. at 313, 70 S.Ct. at 657.

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[14] DDS personnel and administrative law judges may not prohibit a claimant from asserting that his condition has not improved, and submitting evidence on that point. However, the Secretary's nonacquiescence policy specifically enjoins DDS personnel and administrative law judges from considering such evidence in reaching their decisions, regardless of whether it has been submitted.

In Logan v. Zimmerman Brush Co., supra, the Court considered a statutory scheme by which claims of discrimination were automatically denied if the state administrative agency failed, for any reason, to schedule a fact-finding conference within a specified period of time. Id., at ___, 102 S.Ct. at 1152. It was argued that this scheme did not deny claimant's due process because they could seek redress through an independent court action. Id., at ___, 102 S.Ct. at 1158. The Court rejected this argument, noting that "[s]eeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole...." Ibid.

In Fusari v. Steinberg, 419 U.S. 379, 95 S.Ct. 533, 42 L. Ed. 2d 521 (1975), a case involving delay in receipt of unemployment compensation benefits, the Court noted that "[b]oth the statutory and the constitutional questions are significantly affected by the length of the period of the deprivation of benefits." Id., at 387, 95 S.Ct. at 539. It takes a minimum of two years to pursue an SSDI or SSI appeal to a federal district court, where the correct legal standard must be applied.

Moreover, unless this Court grants plaintiffs' request for an injunction requiring the Secretary to apply rules with which it has nonacquiesced, a single appeal to federal district court will frequently be insufficient because the record will not have been adequately developed respecting the relevant issue. Plaintiffs request that the Court take judicial notice of Judge Hill's decision in Ramirez v. Schweiker, No. CV 81-2693-IH(M). [15] Mr. Ramirez received his first notice from SSA advising him that his SSDI benefits were to be terminated in January 1980. Exhibit I. Judge Hill's decision was filed in May 1982, approximately twenty-eight months later. Ibid. Judge Hill recognized that the rule in Patti applied. Id., pp. 2-3. However, because the Patti standards had not been considered at the administrative level, he felt compelled to remand the matter for additional findings. Id., pp. 3-4.

More than three months after Judge Hill's remand order, SSA issued its order remanding the case to an administrative law judge. Exhibit I, p. 2. In its remand order, SSA directed the administrative law judge to make additional findings in light of the Patti decision, but reiterated its position that this standard should not be applied:

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[15] As noted on page 24 of this brief, a copy of Judge Hill's ORDER OF REMAND TO THE SECRETARY OF HEALTH AND HUMAN SERVICES is attached and marked Exhibit I. Also attached, marked Exhibit I, is the Order of Appeals Council remanding the case to an administrative law judge pursuant to Judge Hill's order.

> In reaching the ultimate decision in this case, however, the administrative law judge shall be guided by the provisions of Social Security Ruling 81-6 [in which 'medical improvement' - the Patti rule - is irrelevant], which sets forth the appropriate policy for determining whether 'disability' has ceased.

Id., p. 1. In other words, SSA directed the administrative law judge not to apply the rule in Patti, even after having been ordered to do so by Judge Hill. Plaintiffs are informed by counsel for Mr. Ramirez that, as of this writing, administrative proceedings pursuant to the remand order have still not been completed. Mr. Ramirez, of course, has received no benefits during the more than three-year period his case has been on appeal. Social Security Ruling 81-6 is filed as Exhibit D.

Because the district court is not authorized under 42 U.S.C. §405(g) to take evidence and make an initial determination of eligibility, an individual who has been denied benefits because of the nonacquiescence policy will frequently not receive the benefits to which he is entitled on his first appeal to the court. Rather, like Mr. Ramirez, he is likely to have to complete one appeal to have the court direct SSA to apply the correct rule, pursue additional administrative proceedings on remand (at which time the Secretary will presumably make appropriate findings, but will continue to nonacquiesce in applying the rule), and then return to district court a second time to have a final order entered establishing his right to benefits.

Many claimants denied benefits because of the Secretary's nonacquiescence policy will never appeal. "'[T]he prosecution of an appeal demands a degree of security, awareness, tenacity, and ability which few dependent people have.'" Goldberg v. Kelly, supra, at 269 n. 16, 90 S.Ct. at 21 n. 16, quoting Wedemeyer & Moore, The American Welfare System, 54 Calif. L. Rev. 326, 342 (1966). In a significant number of cases, the claimant will not live long enough to see the error corrected; those who do will have paid "human costs of tragic proportions." Pepper Report (Exhibit A), supra at 19; see n. 1, supra.

The right to appeal to federal district court is a hollow one for most individuals denied SSDI and SSI because of the Secretary's nonacquiescence policy. It is, plaintiffs submit, a constitutionally inadequate remedy for all members of plaintiffs' class.

D. Nonacquiescence Results In An Unacceptable Risk Of Error In The Administrative Proceedings

The risk of an erroneous deprivation of benefits as a result of the procedures used is a significant factor in analyzing whether a scheme provides due process. Mathews v. Eldridge, supra, at 335, 96 S.Ct. at 903. In Logan, the Court noted that the random nature of the denial of claims "necessarily presents an unjustifiably high risk that meritorious claims will be terminated." Logan v. Zimmerman Brush Co., supra, at ___, 102 S.Ct. at 1157. Here, the Secretary's policy of nonacquiescence does not simply permit error: it dictates error when the

Secretary directs DDS officials, administrative law judges, and the Appeals Council to ignore controlling precedent.

Excerpts from defendant's brief, *Lopez* v *Heckler*
U.S. District Court, Central District of
California, June 6, 1983.

III. THE DECISIONS OF COURTS ARE BINDING UPON THE PARTIES TO A SUIT AS TO THE OBJECT OF THE SUIT, AND ARE ENTITLED TO RESPECT AND CONSIDERATION BY, BUT ARE NOT INVARIABLY BINDING UPON, OTHER DEPARTMENTS OF THE GOVERNMENT IN PARALLEL CASES 2/

According to footnote 11 of plaintiffs' memorandum, courts have often been confused by what plaintiffs choose to call "the fact that separation of powers, *stare decisis*, collateral estoppel and *res judicata* all represent expressions of the same fundamental policy, namely, that it is the function of the courts to decide disputed questions of law and that the courts' decision on such disputes are binding on all lower courts until and unless they are overruled or until and unless the people, acting through the legislative branch change the law." Plaintiffs' Preliminary Injunction Memorandum at 25 n.11. While it would perhaps be an overstatement to say that no court has ever been confused by these principles (a number of cases relied upon by plaintiffs, for example, would provide counter-examples to any such generalization), the confusion is largely plaintiffs', for their "fundamental principle," which does not support the relief they seek, is even approximately correct only as a statement of *stare decisis*.

Res judicata "gives conclusive finality to a final, valid, judgment; and, if the judgment is on the merits, precludes

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2/ We have borrowed most of the language of this heading from Mr. Abraham Lincoln's First Inaugural Address.

litigation on the *same* cause of action between the same parties . . ." 1B J. Moore & T. Currier, *Federal Practice* ¶ 0.401, at 11-12 (2d ed. 1982) (emphasis in original) (footnotes omitted). *Res judicata* plainly does not support plaintiffs' contentions. There is no contention that the Secretary, having lost *Patti*, for example, in the Court of Appeals, has refused to abide by the decision and pay Ms. Patti her benefits. Plaintiffs claim only that the Secretary is not paying benefits to other persons who assert that their cases are similar to Ms. Patti's. But since those are different claims asserted by different parties, *res judicata* does not apply.

The doctrine of "collateral estoppel," particularly the sub-doctrine of "offensive collateral estoppel," is somewhat closer to the problem at hand for, where applicable, it can allow "the plaintiff . . . to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully with *another* party." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.4 (1979) (emphasis supplied); *see also Mendoza* v. *United States*, 672 F.2d 1320 (9th Cir. 1982), *pet. for cert. granted*, 51 U.S.L.W. 3552 (U.S. Jan. 25, 1983). But this rule also does not support plaintiffs' position, for the trial court in which a party seeks to relitigate the issue has "broad discretion to determine when it should be applied," *Parklane*, *supra*, 439 U.S at 331 (footnote omitted), whereas plaintiffs would preclude the Government from relitigating an issue in *every* case regardless of the discretionary factors the Supreme Court mandated be considered.

Indeed, as the Ninth Circuit has recognized, Western Oil & Gas v. EPA, 633 F.2d 803, 808-09 (9th Cir. 1980), a number of factors would generally counsel hesitation in applying offensive collateral estoppel against the Government on issues of law as plaintiffs propose. First, courts are properly much more reluctant to apply offensive collateral estoppel where the issue to be precluded is one of law rather than fact. E.g., Restatement (Second) of Judgments § 29(7) (1982); see id. § 28, comments b and c. Second, preclusion against the United States from raising legal issues may interfere with enforcement of public rights, a consideration that counsels more hesitation than in cases merely involving "disputes over private rights between private litigants." Standefer v. United States, 447 U.S. 10, 24-25 (1980); see also American Medical International, Inc. v. Sec'y of HEW, 677 F.2d 118 (D.C. Cir. 1981). Furthermore, invocation of collateral estoppel against the federal government on legal issues of public importance is inappropriate because, through the Office of the Solicitor General, the government, unlike any other litigant, employs a formal mechanism for selective prosecution of appeals from adverse judgments. The government alone regularly takes into account factors other than its narrow interest in prevailing in the particular lawsuit in determining whether to seek further judicial review. As a result, the Solicitor General frequently decides against appeal or certiorari even though the legal conclusions of the deciding court are believed to be erroneous. Such decisions rest upon a host of other factors including: a substantial measure of prosecutorial discretion, equitable and policy considerations, the perceived practical importance of the decision, recognition of the limited resources of the government and sensitivity to crowded dockets of the courts. See, e.g., Note, The Solicitor General and Intragovernmental Conflict, 76 Mich. L. Rev. 324, 324-330 (1977); Carrington, United States Appeals in Civil Cases, 11 Hous. L. Rev. 1101, 1101-1105 (1974); Bork, The Problems and Pleasures of Being Solicitor General, 42 A.B.A. Antitrust L. J. 701 (1973); Sobeloff, Attorney for the Government: The Work of the Solicitor General's Office, 41 A.B.A.J. 229 (1955). Indeed, if, as plaintiffs themselves suggest, Plaintiffs' Memorandum at 18, the government ultimately became convinced that Mr. Finnegan in fact probably was disabled, then it would have been irresponsible to appeal merely because the government disagreed with the Court's legal premises. In other instances, as in Finnegan, where the decision is the first to address the point, there may be little or no practical chance that the Supreme Court would hear the matter until other circuits have ruled. Thus, in some cases, the government as a practical matter cannot appeal, no matter how erroneous the legal holding. As one distinguished study of the Social Security Administration concluded, "[n]o one would seriously argue for the extreme solution -- that the agency is obliged either to appeal or to acquiesce in all adverse court holdings, even all adverse court of appeals holdings: There are often sufficient reasons for doing neither." J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, & P. Verkuil, Social Security Hearings and Appeals, 114 (1978). See 1 C.F.R. § 305.78-2(c)(2) (1983) (Administrative Conference of the United States).

Thus, when, as here, the issue is one of law, and the party to be estopped from relitigation of the issue "is a government agency responsible for continuing administration of a body of law applicable to many similarly situated persons," collateral estoppel "should ordinarily be superseded by the less limiting principle of stare decisis." Restatement (Second) of Judgments § 29, comment i (1982).

Stare decisis has two components: First, "a court is not irretrievably bound by its own precedents, but in the interests of uniformity, stability, and certainty in the law, will follow the rule of law which was established in earlier cases unless clearly convinced that the rule was erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent." 1B J. Moore & T. Currier, Federal Practice 154-55 (2d ed. 1982); see, e.g., Moragne v. States Marine Lines, 398 U.S. 375 (1970). Second, a lower court must follow the decisions of the courts that may review its decisions. See, e.g., Hutto v. Davis, 454 U.S. 370 (1982).

It is evident from the mere description of the doctrine that it does not -- and cannot -- apply to preclude litigants, such as the Secretary, rather than courts from non-acquiescence. The court that issued the opinion has the power to overturn its own decision, and that power can only be exercised at the request of a litigant who has non-acquiesced in the earlier decision and asks that it be overruled.[3] Cf. Code of Professional Responsibility, DR 7-102(A)(2) (attorney may advance good faith agrument in favor of overruling controlling precedent); Model Rule of Professional Conduct 3.1 (same).

For example, in Commissioner of Internal Revenue v. Hallock, 102 F.2d 1 (6th Cir. 1939), the Commissioner of Internal Revenue included certain property in Hallock's estate, even though exclusion was mandated by Helvering v. St. Louis Union Trust Co., 296 U.S. 39 (1935). The Sixth Circuit, being bound by St. Louis Union Trust Co., ruled against the Commissioner. The Supreme Court, which had the authority to overrule its own decision, did so. Helvering v. Hallock, 309 U.S. 106 (1940). But if the Commissioner had previously been subject to an injunction such as plaintiffs propose here, requiring him to acquiesce in the prior decision, the case never would have arisen and the Supreme Court would have been deprived of its power to overrule its own decisions. Hallock is no isolated example. By one count, the Supreme Court has overruled its own decisions no fewer than 171 times through 1980, Congressional Research Service, The Constitution of the United States of America 1789-97 (1973 & Supp. 1980), in many instances at the request of another co-equal branch of the Government which had non-acquiesced in the earlier Supreme

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[3] Plaintiffs surely would not concede that all social security claimants are always bound to acquiesce in earlier unfavorable decisions.

Court decision, e.g., United States v. Scott, 437 U.S. 82 (1978); United States v. Darby, 312 U.S. 100 (1941).

These considerations apply with even greater force when, as here, the question is the Government's duty to acquiesce in court of appeals decisions. In NLRB v. J. Weingarten, Inc., 485 F.2d 1135 (5th Cir. 1973), rev'd, 420 U.S. 251 (1975), the Fifth Circuit noted that the NLRB had either to distinguish a prior Fifth Circuit case "or the decision would be binding precedent on us, absent en banc reconsideration." 485 F.2d at 1137 (emphasis supplied). Thus, the Fifth Circuit recognized that its earlier decisions were binding on its own panels, but not on the en banc court and not on the NLRB, which had authority to seek en banc consideration to press its point. Even more importantly, the Supreme Court held that it need not even determine whether the Fifth Circuit's earlier decision was distinguishable since it would be superseded by the Supreme Court's own ruling. 420 U.S. at 264. Of course, if the Board had been "bound" in its initial decision to follow controlling precedent, then the Supreme Court would have had to consider whether the earlier precedent was distinguishable, and, if not, would have been forced to strike the Board's action for its failure to follow a controlling Fifth Circuit precedent, whether or not it would have been prepared to agree with the Fifth Circuit as an original matter.[4/]

If anything, the principles of Weingarten apply with even greater force here. If the NLRB is bound not to assert a position, a union or employer will often be in a position to assert it in the agency's stead. But if the Secretary is bound in social security cases, there will seldom if ever be another litigant who can assert the trust fund's interest. Weingarten is no isolated example. The Government has often lost a case in a court of appeals, relitigated the issue within the same circuit, and ultimately won in the Supreme Court. For example, the NLRB liti-

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[4/] The Ninth Circuit follows the rule set forth by the Supreme Court in Weingarten. Royal Development Co. v. NLRB, ____ F.2d ___ (9th Cir. Feb. 22, 1983). Plaintiff relies extensively on dicta from other circuits that depart from the Supreme Court's settled practice. For example, in Allegheny General Hospital v. NLRB, 608 F.2d 965 (3d Cir. 1979), the Third Circuit in dictum said that for the NLRB to rule inconsistently with its precedent was "to operate outside the law." 608 F.2d at 970. If so, the NLRB's action in Weingarten was just as "outside the law" and the Supreme Court erred in upholding its action without first determining whether the earlier precedent was distinguishable. Allegheny General and the other cases cited by plaintiff that repeat its dictum seem simply to have overlooked or ignored Supreme Court precedent. Of course, the agency's non-acquiescence power is a power to ask a court of appeals to overrule its precedent, not a power to compel it to do so. See Royal Development Co., supra.

gated and lost the same issue four times in the Sixth Circuit, appealed the fourth case to the Supreme Court -- and won. *NLRB* v. *Magnavox Co.*, 415 U.S. 322 (1974), *rev'g* 474 F.2d 1269 (6th Cir. 1972); *see also* *United States* v. *Estate of Donnelly*, 397 U.S. 286 (1970). Thus, notwithstanding "[d]eviant rulings by circuit court of appeals," "the United States, like other parties, *is entitled to adhere* to what it believes to be the correct interpretation of a statute, and to reap the benefits of that adherence if it proves to be correct, except where bound to the contrary by a final judgment *in a particular case*." *Id.*, 397 U.S. at 294-95 (emphasis supplied). Indeed, the Supreme Court reports are replete with uncritical references to agency non-acquiescences, *e.g.*, *HSCC-Laundry* v. *United States*, 450 U.S. 1, 11 n.5 (1981); *National Muffler Dealers Ass'n, Inc.* v. *United States*, 440 U.S. 472, 483 n.18 (1979); *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). Indeed, in *Dixon* v. *United States*, 381 U.S. 68 (1965), the Court relied in part on a non-acquiescence ruling in reaching its own decision. 381 U.S. at 72-75 & n.8. *See also* *Wyandotte Savings Bank* v. *NLRB*, 682 F.2d 119, 120 (6th Cir. 1982) (agency had "reasonable basis" for litigating issue notwithstanding controlling, adverse Sixth Circuit decision).

Plaintiffs' contrary construction of *stare decisis* commits a fundamental error the Supreme Court has long warned against: "The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechnically applied to judicial review of administrative action." *FCC* v. *Pottsville Broadcasting Co.*, 309

U.S. 134, 141 (1940); cf. Shepard v. NLRB, 51 U.S.L.W. 4087, 4089 (U.S. Jan. 18, 1983). In particular, when a lower court is barred from reexamining an issue already decided by a superior court, it still leaves at least one of the litigants free to raise the issue and thereby afford the superior court an opportunity to overrule its own prior decision. But if the Secretary's action is conclusively unlawful because it violates a prior court of appeals opinion, not only would the appeals court be bound by its earlier decision but the Supreme Court also would be bound to follow the appeals court decision. Thus plaintiffs rely not on stare decisis, but on stare decisis turned upside down. And, as Weingarten illustrates, that is simply not the law.

Plaintiffs also turn separation of powers upside down. The executive branch is not a subordinate of the judicial branch; the two branches are co-equal. The policy of non-acquiescence -- which, after all, is only a policy of being able to ask rather than compel courts to overrule their precedents -- does not threaten the judiciary's authority under Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Marbury and its progeny hold that other branches of Government are bound to abide by judicial decrees and orders. The Secretary has not violated Marbury. She has not, for example, refused to pay Mr. Finnegan and Ms. Patti notwithstanding the Ninth Circuit decisions. Marbury demands no more. Contrary to plaintiffs' assertions, Marbury does not stand for the further proposition that others cannot disagree with the Court in parallel cases and act on their disagreement, risking, of course, the possibility that they will lose any resulting suit:

"Under Marbury, the Court decides a case; it does not pass a statute calling for obedience by all within the purview of the rule that is declared." H. Wechsler, The Courts and The Constitution, 65 Colum. L. Rev. 1001, 1008 (1965). Mr. Abraham Lincoln explained the distinction between Marbury and the position urged by plaintiffs as follows:

> I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all parallel cases, by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is

> to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal. Nor is there, in this view, any assault upon the court, or the judges. It is a duty, from which they may not shrink, to decide cases properly brought before them.

A. Lincoln, First Inaugural Address, 4 The Collected Works of A. Lincoln 268 (R. Basler ed. 1953) (emphasis supplied); see 2 id. 255 (debate with Douglas).

Mr. Lincoln is by no means alone in holding this view. Plaintiffs rely extensively (Plaintiffs' Memorandum at 22-23) on Mr. Justice Jackson's justly famous opinion on separation of powers in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), reconfirming that the Executive can be subject to court decrees, an issue that is not presented here. But plaintiffs ignore what Justice Jackson said on the issue that is raised here:

> [T]he judicial decree, however, broadly worded, actually binds, in most instances, only the parties to the case. As to others it is merely a weather vane showing which

> way the judicial wind is blowing -- a precedent that the Court in a similar case is likely to follow. Its real weight in subsequent cases, however, will depend on many factors, such as the quality of the prevailing opinion, the strength of any dissent, the acceptance or criticism by the profession, and the experience in application of the rule.

R. Jackson, The Supreme Court in the American System of Government 13 (1955).

Perhaps the best modern statement on the subject is that of Henry Hart:

> Because the judicial power is a power to dispose finally of the matters immediately in litigation as between the parties to the litigation, the incidental power to disregard an act of Congress which is found to be unconstitutional is a power to do so with the same degree of finality. But of course it is more than this. Such a decision, once made, is likely to control future cases duly presented for adjudication, since the Court is under an obligation to adhere to prior decisions unless satisfied that they are unsound. Out of either prudence or respect, accordingly, other branches of the

> government and other persons than the litigants may accept the grounds of decision which the Court announces, and usually do. But the Court has never formally asserted any power to control the judgment of Congress or the President when they are called upon to consider constitutional questions as an incident to the discharge of their own functions. What obligation of respect these branches of the Government owe to the earlier opinions of the judicial branch are for them to decide subject to the review of the electorate and, if occasion arises, the further consideration of the Court. The political branches, in other words, retain at all times the crucial ability to force the Court to reexamine in new contexts the validity of the constitutional positions it has previously taken.

Hart, Book Review, 67 Harv. L. Rev. 1456, 1457-58 (1953).

The contrary view of plaintiffs, far from promoting the separation of powers principles intended by the framers, in fact would undermine separation of powers. As one observer familiar with those principles explained:

> You seem to think it devolved on the judges to decide the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the

> Executive more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power has been confided to them by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.

T. Jefferson, Letter to Mrs. John Adams, 11 The Writings of Thomas Jefferson 50-51 (A. Lipscomb & A. Bergh eds. 1904).

The separation of powers principles outlined above have generally been phrased in terms of the executive's power to non-acquiesce in Supreme Court decisions on constitutional questions. Rarely would it be appropriate for even a President to non-acquiesce in a Supreme Court decision (Lincoln non-acquiesced in

Dred Scott), and it has been the Secretary's practice universally to follow the Supreme Court in social security matters. The question here is instead the Secretary's power to non-acquiesce in court of appeals decisions within the circuit involved. Obviously the executive's power to non-acquiesce in court of appeals decisions is, if anything, even greater. On the other hand, where as in Patti and Finnegan, the issue is a statutory or regulatory matter rather than constitutional construction, non-acquiescence is not the only means of correcting judicial error. Congress can always amend the statute. But even on statutory issues the Supreme Court has an obligation where appropriate to overrule its own decisions or those of courts of appeals at the request of the Government, as Helvering v. Hallock, 309 U.S. 106 (1940), and NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), respectively illustrate.[5/]

From the fact that the Secretary has the legal power to non-acquiesce it does not necessarily follow that the power has always

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[5/] Plaintiffs' due process claim adds nothing to their case as it depends on the premise, which we have just shown to be faulty, that the Secretary may not non-acquiesce. See Plaintiffs' Memorandum at 32. The due process right of a party to present evidence on issues made material by substantive law, Bell v. Burson, 402 U.S. 535 (1971), does not transform every erroneous ruling by the Secretary -- or by a district court for that matter -- that a particular issue is not material as a matter of substantive law into a due process violation.

been appropriately exercised. President Lincoln noted that Supreme Court opinions are entitled to "very high respect and consideration," First Inaugural Address, supra, and court of appeals decisions are also entitled to respect and consideration, if not perhaps to the same degree. Similarly, as Professor Hart noted, "prudence" also should enter into the non-acquiescence decision. If a non-acquiescence will almost surely result in remands of hundreds or thousands of cases that will simply have to be considered over again, prudence suggests that neither agency nor judicial resources are wisely used by non-acquiescence.

However, as we argue next, an injunctive decree is not an appropriate means of governing decisions that ought to be guided by such amorphous -- though nevertheless real -- principles as prudence and respect.

FILED
JUN 16 1983
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARIO LOPEZ, et al.,
Plaintiffs,
v.
MARGARET M. HECKLER, et al.,
Defendants.

CIVIL NO. 83-0697-WPG(T)

MEMORANDUM OF DECISION

This is a proposed class action against the Secretary of Health and Human Services and the Commissioner of the Social Security Administration, challenging procedures used in terminating Social Security disability benefits.[1] The plaintiffs are twenty assertedly disabled individuals and fourteen organizations, the former bringing suit on behalf of themselves and those similarly situated. Eighteen of the plaintiffs also seek to have the terminations of their individual benefits reversed pursuant to 42 U.S.C. § 405(g). The plaintiffs have filed motions for vacation of reference to the magistrate, class certification and preliminary injunction; the defendants have filed a motion to dismiss for lack of jurisdiction. The defendants' motion is denied and the plaintiffs' motions are granted, as set forth in the terms of the order filed with this memorandum.

Beginning in March 1981, the Social Security Administration (SSA) noticeably accelerated the rate at which it reviews the disability status of those receiving disability benefits. In the calendar year 1980, 185,639 Continuing Disability Investigations (CDIs) were conducted;[2] in the fiscal year 1982, 435,262 CDIs were conducted.[3] It would appear that the acceleration of the review process resulted in a dramatic increase in terminations. In fiscal year 1982, 195,474 beneficiaries were removed from the disability rolls, as compared with 98,800 terminated in fiscal year 1981.[4]

In two recent opinions, the Court of Appeals of this circuit held that before disability benefits may be terminated for lack of disability, the Secretary must produce evidence showing improvement in the recipient's medical condition. Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982)[5] and Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981).[6] The Secretary has announced that she "does not acquiesce" in these decisions and has issued rulings to her subordinates, including administrative law judges, directing them not to act in accordance with these precedents.[7]

The plaintiffs challenge the constitutionality of the Secretary's policy of nonacquiescence on the grounds that it violates the principles of Separation of Powers and stare decisis, as well as the plaintiffs' right to due process. The Government denies that the policy of nonacquiescence is illegal and contends that the effect of the nonacquiescence rulings is merely to preserve the Secretary's right to ask the courts of appeals, and possibly the Supreme Court, to overrule decisions like Patti and Finnegan in appropriate cases.

This court notes that this litigation involves more than 42 U.S.C. § 405(g) claims and is a class action in which injunctive relief is requested. Since 28 U.S.C. § 636 does not empower magistrates to determine pretrial matters with respect to such actions, and since the parties agree that vacation of reference to the magistrate should be granted for the purpose of these motions, the vacation will be ordered.

With respect to the defendants' motion to dismiss for lack of jurisdiction, the court finds that this case fits within the exception to the exhaustion of administrative remedies requirement enunciated in Weinberger et al. v. Salfi et al., 422 U.S. 749 (1975). There, the Supreme Court ruled that the three-judge district court did have jurisdiction to consider a constitutional challenge by some plaintiffs to certain Social Security eligibility requirements. Those plaintiffs had not exhausted the administrative processes by taking their grievances to an administrative law judge or the SSA's Appeals Council. The Court noted that formal exhaustion was not required there because the purposes of exhaustion--to prevent premature interference with agency processes and to provide the agency an opportunity to correct its own errors--had been served, once the Secretary "has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine . . . ." Id. at 765

The Ninth Circuit Court of Appeals has noted that where a ruling by the Secretary, while "nominally leaving the administrative review process open for claims . . .," in effect makes the result of that process "both pre-ordained and immutable," the Salfi exception applies. Ringer et al. v. Schweiker, 697 F.2d 1291, 1295 (9th Cir. 1982). The court noted that such a ruling "not only makes appeals futile . . .," but also "indicates that the Secretary believes appeals are worthless to the Agency as well as to the claimant." Id. at 1295-6.

Here, in view of the Secretary's attitude, clearly enunciated in her ruling directing administrative law judges and the Appeals Council to ignore Patti and Finnegan, and not to apply a medical improvement standard in disability termination cases, appeals would indeed be futile. Thus, exhaustion of remedies would serve no useful purpose in this instance. Under the authority of Salfi, supra, and Ringer, supra, the defendants' motion to dismiss will be denied.

Regarding the plaintiffs' motions for class certification and for a preliminary injunction, the issues raised are inextricably intertwined with each other and with the merits of the plaintiffs' constitutional challenge. Our Court of Appeals has stated that to obtain a preliminary injunction the moving party must demonstrate "either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the moving party's favor." Beltran et al. v. Meyers et al., 677 F.2d 1317, 1320 (9th Cir. 1982)(emphasis in original). The plaintiffs have fulfilled both tests.

As to the first test, they have demonstrated probable success on the merits by making a strong argument that agencies are bound by the laws of the circuit. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule." This principle was laid down many years ago by Chief Justice Marshall in the landmark case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). It has generally been accepted and acclaimed ever since, and it is the cornerstone of the doctrine of Separation of Powers that has served our country so well. Thus, governmental agencies, like all individuals and other entities, are obliged to follow and apply the law as it is interpreted by the courts. The courts of appeals in other circuits categorically have denied the authority of a federal executive body to nonacquiesce in the law enunciated by our courts of appeals. *Allegheny General Hospital v. NLRB*, 608 F.2d 965 (3rd Cir. 1979)(holding that a NLRB order predicated on the agency's disagreement with the Court of Appeals' interpretation of a statute is operating outside the law and thus unenforceable); *accord*, *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980)("as must a district court, an agency is bound to follow the law of the circuit.").

In announcing the policy of nonacquiescence that is challenged here, the Secretary commented that in "many" instances the evidence on which disability was originally allowed "may not be available, or may not even exist." Such a circumstance would, indeed, make it very difficult, perhaps impossible, fully to apply the rule announced by the Court of Appeals in Patti and Finnegan. If such problems arise, as they occasionally may do, the obligation of the administrative body is to do the best that it can to proceed in harmony with the rule, and infer only such exception as is made necessary by the facts in the particular case. But for the Secretary to make the general assertion that a decision of the Court of Appeals is not to be followed because she disagrees with it is to operate outside the law.

The policy of nonacquiescence announced by the Secretary creates two standards governing claimants whose disability benefits are terminated as a result of such nonacquiescence. If such a claimant has the determination and the financial and physical strength and lives long enough to make it through the administrative process, he can turn to the courts and ultimately expect them to apply the law as announced in Patti and Finnegan. If exhaustion overtakes him and he falls somewhere along the road leading to such ultimate relief, the nonacquiescence and the resulting termination stand. Particularly with respect to the types of individuals here concerned, whose resources, health and prospective longevity are, by definition, relatively limited, such a dual system of law is prejudicial and unfair.

FILED
JUN 16 1983
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARIO LOPEZ, et al.,
Plaintiffs,
v.
MARGARET M. HECKLER, et al.,
Defendants.

CIVIL NO. 83-0697-WPG(T)

ORDER

Pursuant to the Memorandum of Decision filed this date, IT IS ORDERED THAT:

1. The reference to the magistrate of the matters concerned in this order is vacated.

2. The defendants' motion to dismiss for want of jurisdiction is denied.

3. The plaintiffs' motion for certification of a Ninth Circuit class is granted, and such class shall consist of all persons who live within this circuit, who (a) receive or received Supplemental Security Income Disability benefits or social security disability Insurance benefits and have been or will be considered for termination after August 30, 1981, or (b) receive

or received Supplemental Security Income Disability benefits under the "grandfather clause" of the Social Security Act and have been or will be considered for termination after August 25, 1980. This class does not include those who have been or will be terminated due to reasons unrelated to current disability or medical improvement (e.g., actual return to work or improvement in financial condition).

The plaintiffs' motion for certification of a nationwide class is denied.

4. The plaintiff's motion for a preliminary injunction is granted as follows:

The defendants, their agents and employees are enjoined and restrained within the Ninth Circuit:

(a) From failing to follow, implement or accord precedential effect to Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981) and Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982), copies of which are contained in Exhibits A and B, attached hereto.

(b) From implementing the nonacquiescence policy contained in Social Security Rulings Nos. 82-10c, 82-49c and 81-6, attached hereto, Exhibits A, B and C.

(c) In order to accomplish appropriate restoration of disability benefits pending resolution of this action, the court orders the defendants to implement the following procedure:

(i) Within sixty (60) days following the date of this order, the defendants will notify (a) each class member who had been receiving Supplemental Security Income Disability benefits under 42 U.S.C. § 1382c(a)(3)(E), and who was terminated from such benefits after August 25, 1980, and (b) all other persons who have been terminated from either Title II social security disability insurance or Title XVI Supplemental Security Income Disability after August 30, 1981, for the purported reason that his or her disability had ceased, whether or not such person has appealed, that:

> Such person may apply for reinstatement of benefits if he or she believes that his or her medical condition has not improved following the granting of disability benefits.

(ii) Upon receiving such application, the defendants will forthwith reinstate and pay benefits in the monthly amounts such person would have been receiving had his or her benefits not been interrupted.

(iii) Following such reinstatement, if the defendants or their agents or employees conduct a disability investigation or other screening of such person, they will apply the standards set forth in Patti v. Schweiker and Finnegan v. Matthews and, if they conclude that such person's medical condition has improved and he or she is no longer disabled, they will identify the evidence relied upon to reach that conclusion.

(iv) Following such review, persons who are notified of an initial determination that their benefits shall cease shall be given an opportunity to contest the determination and pending such review, they shall continue to receive aid as provided in current laws and regulations.

DATED: June 16, 1983.

William P Gray

WILLIAM P. GRAY
United States District Judge

RULING OF NON-ACQUIESCENCE

Nonpayment

SECTION 1614(a)(3)(E) (42 U.S.C. 1382c(a)(3)(E)) SUPPLEMENTAL SECURITY INCOME—CONTINUANCE OR CESSATION OF A GRANDFATHEREE'S DISABILITY—A RULING OF NON-ACQUIESCENCE

20 CFR 416.994(e) **SSR 82-10c**

Finnegan v. Matthews, 641 F. 2d 1340 (1981)

The Social Security Administration (SSA) does not acquiesce in the court's decision.

The claimant, who had been receiving State disability welfare payments since 1972, was grandfathered into the Supplemental Security Income (SSI) program on January 1, 1974. Section 1614(a)(3)(E) of the Social Security Act (the Act) provides for the continued payment of SSI benefits to a grandfatheree who "is permanently and totally disabled as defined under a State plan...so long as he is continuously disabled as so defined." Following a continuing disability investigation, SSA determined that the claimant's SSI benefits would terminate because he did not meet the requirements for entitlement at the time of the continuing disability investigation. This determination was affirmed by the district court.

The court of appeals, however, reversed SSA's determination. It found that SSI disability benefits to a grandfatheree may not be terminated unless SSA shows that there was either a material improvement in the grandfatheree's medical condition or a clear and specific error in the prior State determination. Because neither of those conditions was shown by SSA to be met, the court held that SSA's termination of the claimant's SSI benefits was improper.

SSA believes that the court's standard for determining whether SSI disability benefits to a grandfatheree should terminate would be impossible to administer and that the correct standard for making such a determination is in 20 CFR 416.994(e); i.e., that disability of a grandfatheree terminates when his or her "disability as shown by current medical or other evidence does not meet the criteria of the appropriate State plan" and does not meet the Federal criteria. Many grandfatherees were on State disability rolls for years before conversion, and the evidence on which they were originally allowed may not be available, or may not even exist. Therefore, in those cases, SSA could not possibly prove either "material improvement" or "clear and specific error" in the prior State determination. Thus, under 20 CFR 416.994(e) the grandfatheree properly remains in SSI benefit status only until it is found that the grandfatheree's disability, as shown by current medical or other evidence, meets neither the State nor Federal definition of disability. SSA believes that this regulation is fully consistent with the requirements of section 1614(a)(3)(E) of the Act and with congressional intent.

Consequently, SSA *holds* that the standard in 20 CFR 416.994(e), and not the one set forth by the court, should apply in determining whether the disability of a title XVI grandfatheree has ceased.

GOLDBERG, Circuit Judge:

This case presents the novel problem of interpreting a grandfather clause authored by Congress as part of its 1972 rewriting of sections of the Social

Security Act ("Act"). Defendant, the Secretary of Health, Education and Welfare (hereinafter "Secretary" or "HEW"), seeks to rely on its own regulations, written after the passage of the Act, to read the prose of congressional Magi as those of legislative Indian givers, and to interpret a wise, fair grandfather clause as a grizzly, old miser. Because we find this Scrooge-like transmogrification of the clause to be inconsistnet with its plain meaning and legislative history, with subsequent intimations by the judicial readership, and with the dicates of both policy and common sense, we reject the position of the Secretary.

I. *PORTRAIT OF A GRANDFATHER: THE CLAUSE*

In October, 1972, Congress repealed the categorical assistance program (Title XIV of the Social Security Act) which had provided federal grants to state-administered disability assistance programs. 42 U.S.C.A. §§ 1351-1355, Pub. L. No. 92-603, 86 Stat. 1484 § 303 (repealed 1972). At the same time, Congress established a program identified as Supplemental Security Income for Aged, Blind and Disabled ("SSI"), which became effective in January 1974. 42 U.S.C.A. §§ 1381-1383 (West 1974). Under the federally-administered SSI program, the federal government assumed the burden of providing benefits directly to those needy people who were "disabled" as defined in the Act. 42 U.S.C.A. § 1381 (West 1974).

As part of the definition of "disability" under the Act, Congress included the following "grandfather" clause:

> [A]n individual shall also be considered to be disabled for purposes of this subchapter if he is permanently and totally disabled as defined under a State Plan approved under subchapter XIV or XVI of this chapter as in effect for October 1972 and received aid under such plan (on the basis of disability) for December 1973 (and for at least one month prior to July 1973), so long as he is continuously disabled as so defined. 42 U.S.C.A. § 1382c(a)(3)(E) (Supp. 1980).

The requirement that the individual be disabled for at least one month prior to July 1973 was introduced as a last minute amendment to the original provision. The purpose of this "rollback" amendment was to prevent states from transferring their welfare recipients onto the disability rolls in anticipation of the federal takeover. Those individuals who received disability aid under a state plan during December 1973 but who had not received aid under such plan for at least one month prior to July 1973—known as "rollbacks"—were subsequently classified, pursuant to agency regulations, as "presumptively disabled" and thus were eligible to receive SSI benefits until an initial determination of eligibility could be made. See 42 U.S.C.A.§1383(a)(4)(B) (Supp. 1980), 20 C.F.R. § 416.954. In contrast, the availability of federal disability benefits to those individuals who had received aid under a state plan for at least one month prior to July 1973—commonly known as "grandfatherees"—is controlled solely by the operation of the statutory grandfather clause.[1]

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[1] A review of the statutory scheme governing the payment of benefits to rollbacks is necessary in order to fully understand the case law in this area. *See* infra, p. 7.

II. *FINNEGAN'S ACHE*

On November 16, 1972 appellant Finnegan's application for state disability was approved by the state of Washington disability review board. Finnegan received benefits from the state until January 1, 1974 at which time he was converted to and began receiving benefits from the federal SSI program. Based on the time period during which he had received disability benefits pursuant to the state plan, Finnegan qualified as a grandfatheree under the Act.

In December, 1975, Finnegan received notice that his benefits would cease on the basis that his medical condition had allegedly improved and his disability had ceased. Finnegan challenged these conclusions and contested the decision to terminate his benefits. At the agency hearing, the administrative law judge ("ALJ") concluded that Finnegan's medical condition had not improved, but nevertheless found that HEW was entitled, based on agency regulations, to make an "initial determination" of Finnegan's eligibility. Reviewing the evidence presented at the hearing, and based on an independent reading of the formerly employed state statute, Washington Administrative Code, Section 388-24-370,[2] the ALJ concluded that Finnegan was not "disabled," The district judge affirmed the finding that Finnegan's condition had not improved, but concluded that the Secretary had the authority to "initially determine" the eligibility of both grandfatherees and rollbacks. Finding that substantial evidence supported the "initial determination" of no disability in the case at bar, the district judge affirmed the termination of Finnegan's benefits.

III. *TO HAVE OR HAVE NOT: TWO INTERPRETATIONS OF THE CLAUSE*

[1] On appeal, Finnegan argues that the grandfather clause of the Act operated to automatically qualify grandfatherees to receive SSI benefits. Having been qualified by congressional grandfathering to receive benefits—or, more correctly, having been exempted from the requirement that a potential recipient's eligibility be "initially determined" by the Secretary—Finnegan contends that it was improper for the Secretary to terminate his benefits based on an "initial determination" and in the absence of any express finding of either medical improvement or error in the earlier state determination of eligibility.[3]

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[2] Washington Administrative Code, Section 388-24-370 provides:

> "(1) In general, permanently and totally disabled means that the individual has some permanent physical or mental impairment, disease or loss that substantially precludes him from engaging in a useful occupation within his competence, such as holding a substantially gainful job or homemaking."

[3] We reject the Secretary's contention that Finnegan failed to raise this claim in the court below and thus has waived it. Although worded in a slightly different manner, the heart of Finnegan's argument before both the ALJ and the district judge was that he was exempt from the requirement of an "initial determination."

In support of its right to "initially determine" a grandfatheree's eligibility for SSI benefits and, therefore, to terminate such benefits without a finding of medical improvement or error in the earlier state assessment of eligibility, HEW advances a significantly different interpretation of the grandfather clause. HEW argues that the clause was intended merely to guarantee the continued receipt of benefits by grandfatherees pending the Secretary's "initial determination" of continued disability. In contrast, individuals classified as "rollbacks" faced the danger of having had their benefits terminated (as of January 1, 1974), pursuant to the Act, pending the "initial determination" of their disability based on federal standards.[4] Thus, HEW argues, the grandfather clause should be read not to displace the agency regulations governing the proper means of determining eligibility, but merely to provide for continued payment until a proper determination could be made.

The main HEW regulation governing "initial determinations" provides:

> Initial Determinations
>
> The Administration shall, with respect to the application (or conversion) of ... any individual who is or claims to be an eligibile individual ..., make findings of fact setting forth pertinent conclusions and an initial determination with respect to eligibility for supplemental security income benefits and the amount of such benefits.... 20 C.F.R. § 416.1403(a).

HEW reasons that since Finnegan was being "converted" to the federal SSI program, and since the grandfather clause should not be read to displace regulation 416.1403(a), Finnegan was required to satisfy an initial determination of eligibility in order to prevent the termination of his benefits. Since substantial evidence supports the finding that, based on an "initial determination," Finnegan was not disabled, HEW concludes that the decision to terminate benefits should be affirmed.

IV. *IN QUEST OF THE HOLY GRAIL: SEARCHING FOR THE MEANING OF THE STATUTE*

While success for the novelist often lies in suggestive ambiguity allowing the readers to share in the process of creation, perfection for a statute's crafter [Sic] lies in unquestionable clarity, forcing his audience to participate only in the process of implementation. When those charged with the responsibility of enforcing a statute find sufficient ambiguity by which to substitute creation for rote implementation, the judiciary must insure that the interpretation of the statute conforms to the probable intent of statute's collective authors. Not gifted with literary omniscience, the judiciary must rely on the words of the statue, legislative history, subsequent case law, common sense and consideration of relevant policy implications in order to properly shape its critique.

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[4] As noted earlier, this potential hardship to the rollbacks was prevented by the decision of the Secretary to view all rollbacks as "presumptively disabled" and, therefore, as qualified to receive benefits, pursuant to regulation, pending the "initial determiantion" of their eligibility. See page 3, *supra*.

(a) *Plain Meaning*

[2] The best indicator of what statutory words mean is what they say.[5] In the present case, the grandfather clause provides that grandfatherees—like Finnegan—are to "be considered disabled for purposes of [the federal statute] if [they are] ...disabled as defined under a state plan ...so long as they are continuously disabled *as so defined.*" 42 U.S.C.A. § 1382c(a)(3)(E)(Supp. 1980) (emphasis added). The words "as so defined" refer back to the state definition of "disabled" and seem to be largely dispositive of the case. The grandfathered beneficiary is assured of receiving benefits, and correlatively, is legislatively exempt from ever having to meet the federal eligibility criteria, as long as he continues to satisfy the criteria formerly adopted and employed by the appropriate state in assessing "disability."

[3,4] It is relatively easy to locate the former state statute based on which a grandfatheree was ruled to be "disabled;"[6] however, even the wisdom of hindsight will often be insufficient to allow an ALJ to understand fully how a state disability statute had been routinely interpreted and applied by the relevant administrators. Hence, it is indeed difficult, if not impossible, for an ALJ to properly assess whether a recipient is "continuously disabled" under the "complete" state standard. An ALJ's inquiry must therefore focus on whether a clear and specific error had been committed during the previous state determination of eligibility[7] and on whether the recipient's medical condition has materially improved. Absent a finding of clear and specific error in the earlier determination a recipient must logically have been "disabled under a state plan;" absent a finding of subsequent material medical improvement a recipient must logically still be disabled "as so defined." The words of the statute could scarely be clearer in providing that it is the recipient's condition and not the identity of the enforcing agency which must change in order to terminate disability benefits. The Secretary may not terminate benefits absent a showing of previous

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[5] The plain meaning of words and not the perception of such words by interested parties like the HEW shall always be the "master":

> "When I use a word" Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—no more, no less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is" said Humpty Dumpty, "which is to be master—that all." L. Caroll, *The Annotated Alice*, 269 (1960).

[6] In fact, as noted above, the ALJ in the present case referred to the applicable Washington state statute in making his "initial determination." *See* page 3 *supra*.

[7] For example, proof that the previous state determination had been materially influenced by an incorrect medical report could serve as sufficient grounds for finding that a former recipient is no longer "continuously disabled" under the state standard, even though the recipient's medical condition has not improved. On the other hand, the mere fact that an ALJ's independent assessment of a grandfatheree's eligibility under the former state statute differs from the state's former assessment of eligibility is not sufficient to find that clear error had been committed during the earlier determination. There has been no claim in the present case that a clear and specific mistake—such as reliance on a false medical report—was committed during the state determination of Finnegan's eligibility. Therefore, we assume that no clear error had been committed in this case.

clear and specific error or medical improvement which is sufficient to establish that an applicant is no longer "continuously disabled as so defined."[8]

B. *Case Law*

Although it is scarce and by no means (in itself) dispositive on the issue, the case law in the area lends support to Finnegans's interpretation of the grandfather clause. While no case directly considers the question of terminating SSI benefits to former state recipients who are covered by the grandfather clause, several cases focusing principally on the rights of "rollbacks", see note 1, *supra,* discuss the position of grandfatherees in an effort to distinguish the eligibility of the two groups. The dicta in each of these cases indicate that their judicial authors considered grandfatherees to be automatically eligibile for SSI benefits and exempt from HEW's "initial determinations."

The Courts of Appeals have consistently referred to the position of grandfatherees as "conclusively presumed" to be qualified for federal SSI benefits. In *Johnson v. Mathews,* 539 F.2d 1111 (8th Cir. 1976), the Eighth Circuit noted in dicta that while grandfatherees were "conclusively presumed" to meet federal standards, rollbacks were not "automatically qualified." Id. at 1115. Similarly, in *Ryan v. Shea,* 525 F.2d 268 (110th Cir. 1975), the Tenth Circuit explained that:

> As a part of the definition of eligibility, Congress included a "grandfather" clause whereby persons receiving disability benefits from a state program as of December 1973 would be conclusively presumed to meet federal standards. We would note parenthetically that the federal program was in one sense, at least, a continuation of the old federal-state program. Id. at 270.

See also, Tatum v. Matthews, 541 F.2d 161, 163 (6th Cir. 1976).[9]

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[8] Although there is a dearth of legislative history concerning the proper interpretation of the grandfather clause, the existing history supports the conclusion that Congress did not intend to allow the Secretary to make "initial determinations" of the eligibility of grandfatherees. For example, the report of the House Ways and Means Committee, H.R.Rep. No. 92-231, 92nd Cong., 2nd Sess. (1972) reprinted in U.S. Code Cong. & Ad. News 4989, includes a statement which indicates that that committee thought that grandfatherees would automatically qualify for federal SSI benefits: "In order to facilitate an orderly transitional process, those blind and disabled people who are on the benefit rolls in June 1972 under existing State programs would be considered blind or disabled for purposes of this program." *Id.* at 5134.

[9] The only 9th Circuit case on the subject, *De Lao v. Califano,* 560 F.2d 1384 (9th Cir. 1977) while not shedding a great deal of light on the issue at bar, does indicate an assumption that only rollbacks would be required to meet federal eligibility standards:

> Under the new SSI program, the federal government assumed most of the burden of providing benefits to those needy persons who were disabled as defined by the Act. As part of the definition of disability, Congress included a "grandfather" clause whereby persons receiving disability benefits as of December, 1973, under a state plan approved under former Title XIV or XVI as in effect for October, 1972, were considered disabled for purposes of the new SSI program. 86 Stat 1471-72, 42 U.S.C. § 1382c(a)(3)(A) (Supp 11, 1972).
>
> ... As a result, all persons who became qualified under a state plan after July 1, 1973, had to meet the new federal standards of disability to be eligible under the SSI program. Id. at 1386.

Finnegan's interpretation of the grandfather clause is even more strongly supported by the district court opinions in the area. For example, in *Buckles v. Weinberger*, 398 F.Supp. 931 (E.D.Pa.1975), the court informatively noted:

> Thus, this [grandfather] provision provided, in essence, that each and every recipient under a state plan in December of that year would automatically begin to receive benefits under SSI for the following month. It is clear from this "grandfather" clause that *SSI was intended by Congress as a wholesale replacement for, and continuation of, the former state-federal programs,* in that the identity of recipients under the two plans of assistance would be absolute. It was only with respect to *future* applicants for SSI that the uniform federal criteria were to apply. Id. at 939 (emphasis in original).

Similarly, in *Brown v. Weinberger*, 382 F.Supp. 1092 (D.Md.1974), aff. 529 F.2d 514 (4th Cir. 1975), the court noted that grandfatherees were "automatically" and "unconditionally" qualified for conversion to SSI. Id at 1094 (dicta). Finally, the Secretary's argument was again expressly rejected in *Savrino v. Weinberger*, 396 F.Supp. 992 (D.R.I. 1975) where the court, in refuting a different argument advanced on behalf of the Secretary, noted:

> Basic to the defendant's argument is the assumption that Congress intended to restrict SSI eligibility to only those who specifically qualified for the SSI program under SSI definitions of eligibility. This assumption, however, empirically denied by the fact that all persons who received [state] benefits prior to July of 1973 were automatically "grandfathered" into the SSI program with no requirements that their eligibility be reviewed under the "new" SSI definitions. Id. at 1001 (dicta).

D. *Policy Analysis and Common Sense*

In addition to violating the plain meaning of the statute and the clear language—albeit in dicta—of every case discussing this issue, the Secretary's argument seems to cut against both policy and common sense. In 1972, Congress revamped the social security system to create a centrally and federally administered disability program. The new program established uniform standards of eligibility to be enforced by a single decision-making body. Within this framework, Congress specifically exempted those individuals who had previously qualified for benefits under state law from the burden of satisfying the new uniform federal standards. This exemption was accomplished through the inclusion within the new Act of a provision commonly referred to as a "grandfather" clause.

[5] The sole function of a grandfather clause is to prevent the harsh and often unfair operaion of a statutory change. In the case at bar, the statutory revision threatened to deprive individuals of the continued right to receive disability benefits. The unfairness which could have resulted from the statutory change—the undesired potential side effect of the new disability

program—would have been the discontinuance of benefits to former recipients prompted solely by a change in the rules of the game and undertaken in the absence of any improvement in their disabling condition. This harsh side effect was averted through the inclusion of the grandfather clause. Yet, by reading the clause not as an exemption from prejudice, but as a temporary delay of the onset of such prejudice, the Secretary seeks to preserve the same harsh side effect which the grandfather clause was intended to eliminate. The Secretary's interpretation[18] of the provision would completely undermine the very purpose for which the grandfather clause was adopted.[19]

V. *FROM HERE TO ETERNITY: CONCLUSION*

The tools of statutory interpretation clearly indicate that the grandfather clause was designed to qualify automatically those included within its coverage for SSI benefits, and correlatively, to exempt grandfatherees from the requirement of undergoing "initial determinations" of eligibility by HEW. Therefore, benefits to a grandfatheree must not be terminated absent proof of a material improvement in his medical condition or of the commission of a clear and specific error during the prior state determination. Since there has clearly been no material improvement in Finnegan's medical condition or clear and specific error in the prior state proceedings awarding benefits to Finnegan, it was improper for the district court to allow a termination of Finnegan's benefits. The decision of the lower court is therefore

REVERSED.

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[18] We are mindful of the maxim that a court should give deference to the interpretation of a statute by the agency charged with its administration. *Brubaker v. Morton*, 500 F.2d 200 (9th Cir. 1974). It is well established, however, that "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *National Labor Relations Board v. Brown Food Store*, 380 U.S. 278, at 291, 85 S. Ct. 980, at 988. 13 L.Ed 2d 839 (1965); *Usery v. First National Bank of Arizona*, 586 F. 2d 107, 111 (9th Cir.).

[19] As an extreme example, the Secretary could have set out on January 2, 1974 to make the first "initial determination" of the eligibility of a grandfatheree. A former state recipient could then have been disqualified from receiving benefits (without any change in his condition) on the first day of the program. The grandfather clause would have thus been rendered totally meaningless.

RULING OF NON-
ACQUIESCENCE

SECTION 1614(a)(3)(A) (42 U.S.C. 1382c(a)(3)(A)) SUPPLEMENTAL SECURITY INCOME—CONTINUANCE OR CESSATION OF A NON-GRANDFATHEREE'S DISABILITY—A RULING OF NONACQUIESCENCE

20 CFR 416.994 **SSR 82-49c**

Patti v. Schweiker, 9th Circuit, Civ. No. 80-5763 (2/18/82)

The Social Security Administration (SSA) does not acquiesce in the court's decision.

The claimant had been receiving supplemental security income (SSI) benefits as a disabled individual since 1976. In December 1977, SSA informed the claimant that her disability had ceased. After a hearing in March 1978, this determination was reversed by an administrative law judge (ALJ) and the claimant's benefits were continued. SSA then informed the claimant that her disability had ceased in April 1979, and that determination was affirmed by the district court.

The Court of Appeals, however, reversed SSA's determination. The court found that the determination of disability in 1978 gave rise to a presumption at the hearing in 1979 that the claimant was still disabled. While the opinion acknowledges that this presumption does not shift the burden of proof and the claimant still has the burden of proving her case, the court found that the presumption imposes on the Secretary the burden of going forward with evidence that the claimant's condition has medically improved or otherwise changed. Finding that there was essentially no evidence to support a conclusion that the claimant's condition had changed, the court held that SSA's determination that the claimant's disability had ceased was not supported by substantial evidence.

In essence, the court has concluded that SSA must show that an SSI recipient's condition has improved or otherwise changed before it can determine that the recipient's disability has ceased. SSA disagrees with the court's conclusion that medical improvement or other change is required in these cases.

Regardless of whether medical improvement or other change is or is not shown, under 20 CFR 416.994(b)(1), a determination of cessation is appropriate for an SSI *nongrandfatheree* if the recipient is not disabled under the Federal criteria; i.e., current medical or other evidence shows that the recipient is able to engage in substantial gainful activity.[a]

Since the claimant in *Patti* is an SSI nongrandfatheree, SSA determined that her disability ceased in April 1979 because it found, on the basis of current medical evidence, that she was capable of engaging in substantial gainful activity (i.e., she does not meet the Federal definition of disability).

As noted above, under 20 CFR 416.994(b)(1), issued in August 1980, SSA is not required to show medical improvement or other change in order to terminate SSI disability benefits. However, the final administrative decision in *Patti* was issued prior to August 1980 so that the court's decision in *Patti* was based on an administrative decision involving regulations no longer in effect. Moreover, the Court of Appeals in *Patti* did not even address either the August 1980 regulations or the earlier regulations governing when disability ceases. For these reasons (and since there are other Court of Appeals decisions which do not require a showing of improvement to terminate disability benefits), we believe that *Patti* does not provide a judicial interpretation of the disability regulations which should be followed.

Consequently, SSA *holds* that, even if current medical or other evidence does not show "medical improvement" or other change, the disability of a nongrandfathered SSI recipient is subject to cessation if such evidence shows that the recipient is able to engage in substantial gainful activity (i.e., the recipient does not meet the Federal definition of disability).

FERGUSON, Circuit Judge:

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[a] A showing of medical improvement or other change is also not required in cessation cases involving an SSI grandfatheree (see SSR 82-10c (Jan 1982)).

Plaintiff began receiving supplemental security disability benefits in 1976. In December 1977, she was informed that her disability had ceased. This determination was reversed on March 31, 1978 by an administrative law judge (Judge Ohanian) after a hearing, and plaintiff's benefits continued. In June 1979, she was informed that her disability had ceased in April 1979. After a hearing on August 20, 1979, another ALJ (Judge Varni) upheld this decision. When the Appeals Council declined to review the decision of the ALJ, it became the final decision of the Secretary. In due course, adopting the conclusions and findings of a federal magistrate, the district court affirmed, and this appeal followed.

Claimant argues that the decision was not based on substantial evidence, that various of her procedural rights were abused, and that the determination resulted from illegal use of social security regulations as a substitute for an individualized inquiry into her disability.

Claimant's attack on the use of 20 C.F.R. §§ 416.902 *et seq*. as the basis for a disability determination is not well taken. However, because the decision of the Secretary is not supported by substantial evidence, we reverse.

I. BACKGROUND

Claimant underwent a lumbar laminectomy in 1973. On the basis of a report from Dr. Tsuneo Hirabayashi relating to a November 28, 1977 consultative examination, the Social Security Administration determined that claimant's disability had ceased in November of 1977. In his decision overturning this determination, Administrative Law Judge Ohanian observed:

> Dr. Hirabayashi gave diagnostic impression of status post operative lumbar laminectomy L5-S1, and concluded that the claimant could do light work. It does not appear that this opinion fully considered the claimant's mental-emotional state and her subjective complaints of severe pain.

He went on to say:

> Crucial to the determination of disability is resolution of the question of the degree of severity and duration of the pain suffered by the claimant together with findings on the extent of restrictions and limitations imposed on the claimant's ability to perform work activities and the existence of residual functional capacity to perform a job. These questions must of necessity be largely resolved, by the credibility that may properly be attributed to the claimant's allegations of subjective symptoms and resulting functional loss.

Judge Ohanian's resolution of these questions was expressed in his findings that:

> 3. On October 2, 1973, the claimant underwent lumbar laminectomy at L4-L5 and L5-S1; possible residuals of such surgery could cause severe disabling pain.

4. At the hearing of March 23, 1978, the claimant gave credible testimony of constant moderate to severe pain in her back and left leg.
5. The claimant's subjective complaints when considered in light of the medical evidence, warrants [sic] a finding of continuing disability.
6. A preponderance of the substantial credible evidence establishes a medically determinable impairment which has caused a level of pain that has prevented the claimant from working on a sustained basis beginning February 19, 1976 and continuing through the date of this decision.

However, Judge Ohanian also noted that 20 C.F.R. § 404.1507 provides that a claimant who "willfully fails to follow prescribed treatment cannot by virtue of such failure be found to be under a disability," and observed that "the claimant . . . should not expect the Administration to continue payment of benefits, if she willfully fails to follow prescribed treatment to alleviate her impairment." In this connection, Judge Ohanian found that her impairment "could reasonably be regarded as partially remediable and possibly substantially remediable," and that "[c]onsequently, she should take reasonable action to treat and alleviate her symptoms and impairments." He also found that her impairments should be reevaluated "at some appropriate future date."

Thereafter, claimant began undergoing treatment in the office of Dr. Morrie Brandman,[1] a specialist in family practice, and subsequently from Dr. William P. Bracciodieta, a neurologist. She also availed herself of the vocational services of the California Department of Rehabilitation.

In June 1979, the Administration informed claimant that her disability was considered to have ended in April 1979, and that her benefits would cease at the end of June 1979. In August, Administrative Law Judge Varni upheld this determination. His decision was based on medical reports from Dr. Brandman and Dr. Bracciodieta, and on the results of electromyographic and radiological studies undertaken at Dr. Bracciodieta's request. It was further based on his assessment of the claimant's testimony at the hearing as to subjective symptoms of pain, and his assessment of the testimony of Mr. Rene Garcia, a program supervisor with the California Department of Rehabilitation, who testified on claimant's behalf.

II. THE MEDICAL REPORTS

The central issue in this appeal is whether the various medical reports furnish an adequate basis for the findings and decision of the tribunals below that claimant's disability has ceased. We turn first, therefore, to an examination of those reports.

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[1] Although Dr. Barndman's name and signature appear on the Medical Report Form filed on May 23, 1979 with the Administration, the substantive portions of the form simply refer to the attached medical records. Those records bear the signature of, and seem to have been compiled by, a Dr. R. Fleming Jones, apparently a physician working in Dr. Brandman's office. Nevertheless, the parties to this action, the ALJ, the magistrate, and the district judge, all refer to Dr. Brandman as the treating physician and the author of the reports.

a. *The Brandman Reports*

Judge Varni's review of the Brandman reports was as follows:

> The relevant medical evidence consists in part of records from Dr. Morrie Brandmann [sic] a specialist in family practice who has been following the claimant since August 14, 1978. The records indicate that the claimant has been mildly hypertensive and was treated by Dr. Brandmann for that problem and that she was considerably obese. Dr. Brandmann's office notes under date of September 15, 1978 indicate the claimant's blood pressure at 140/98 and her weight at 181-3/4 pounds. The note also contains the information that the claimant was "feeling not too bad". Under date of October 4, 1978 the claimant's blood pressure was noted to be 128/84 and her weight 179 pounds. The notation was also made that the claimant "feels fine". It was also noted that she was "doing well". On November 7, 1978 claimant's blood pressure was found to be 140/90 and her weight 181 pounds. Again it was noted that the claimant "feels fine". Under date of February 15, 1979 which is the last entry in evidence claimant's weight was 177 pounds and her blood pressure 140/100.

Study of his entire decision suggests quite clearly that Judge Varni relied in part on the notations in the Brandman reports to the effect that the claimant "feels fine" or is "feeling not too bad" to discount her own testimony that she was, and had been, in almost constant, severe pain. The other information he abstracts from the Brandman reports does not seem to have any direct bearing on whether she was still suffering from her earlier lumbar problems, nor whether she was willfully failing to seek effective treatment for them. In light of this reliance, examination of the Brandman reports themselves is revealing. First of all, the entries relating to blood pressure, weight, and pulse are clearly in a different handwriting from the remainder of the notations. They all come at the beginning of the notations for each day's visit. All of the damning comments ("feels fine," etc.) occur in these initial notations. These facts suggest (although they do not prove) that these notes were written not by Dr. Brandman or Dr. Jones,[3] but by a nurse or other office assistant. That possibility raises obvious questions as to the weight these comments ought to be given in assessing the claimant's disability. Those questions are nowhere discussed, or even mentioned, by the ALJ, the magistrate, or the district judge. We decline to speculate whether we would be obliged to uphold an explicit finding that these remarks represented the clinical impressions of a treating physician. In the absence of such a finding, however, we are not persuaded that the remarks furnish any significant evidence of the claimant's medical condition. Secondly, although Judge Varni relates only that Dr. Brandman treated claimant for hypertension, the notes clearly indicate a diagnosis of "Post Lumbar Disc Pathology."[3] These records simply do not contain any evidence that we can detect that the claimant's condition had improved at all.

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[3] See footnote 1, *supra*.

b. *The First Bracciodieta Report*

This report, dated 4/24/79, is described by Judge Varni as follows:

> There is also in evidence a report dated April 24, 1979 from Dr. William P. Bracciodieta a neurologist who has been following the claimant since that date. On neurologic examination Dr. Bracciodieta noted that the mental status was essentially unremarkable. The cranial nerves serially tested were within normal limits. The motor system showed normal power, tone, and coordination in both the upper and lower extremities. The deep tendon reflexes were elicited. Sensory examination revealed only patchy dysesthesias in the L4-5 and L5-S1 dermatones bilaterally. Examination of the spine revealed no evidence of paravertebral muscular spasm.

Left out is Dr. Bracciodieta's "diagnostic impression": "Chronic low back pain syndrome with probable chronic, non-progressive radiculopathy." Also unmentioned is the fact that this report indicates no change, as far as we can tell, from the neurological study performed by Dr. Hirabayashi in November 1977, in which, aside from slightly diminished sensations in the medial half of the left foot, and a slight weakness in motor power on the right side, the results were all normal. That report, of course, was already determined by Judge Ohanian in the 1978 hearing to be consistent with the continuing existence of claimant's disability.

c. *The Electromyographic and X-Ray Studies*

Judge Varni also relied on the EMG and X-ray studies ordered by Dr. Bracciodieta.[4] Judge Varni correctly relates that the myograms were

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[3] The notes for 8/14/78 include the following:

Diag: (1) Hypertension
(2) Post-Lumbar Disc Pathology

Those for 8/22/78 include:

Diag: (1) Hypertension
(2) Post-Lumbar Disc Syndrome
(3) Chronic Tension

Those for 9/8/78 include:

Diag: (1) Hypertension
(2) Lumbar Disc Syndrome
(3) Chronic Tension [illegible]

[4] Judge Varni's observations were as follows:

At the request of Dr. Bracciodieta electromyographic studies of the lower extremities and associated paravertebral musculature were performed together with a nerve conduction [sic] studies of both lower extremities. The nerve conduction studies of both lower extremities were within normal limits and not demonstrative of any neuropathology. The electromyogram was also interpreted as being a normal study so far as could be determined con-not "positive for the existence of any neuropathology." Left out, however, is this statement of the physician who performed the tests:

> It should be emphasized, however, that because of the patient's previous back surgery, examination of the paraspinal muscles may be unreliable. She has probably severed her dorsal rami during the course of surgery and therefore, she could conceivably have a herniated disc, in spite of the fact that we did not pick up a positive examination on her paraspinals. This EMG should be correlated with the patient's clinical condition.

Judge Varni also correctly reports that the X-rays disclosed only "mild degenerative and post-surgical changes." Again, however, this represents no change from the clinical status of the claimant at the time of the prior hearing.

The account above comprehends all of the medical evidence relied on below to support the Secretary's determination that the claimant's disability has ceased. We are of the opinion that it does not comprise substantial evidence of any change in the claimant's condition since the 1978 hearing and determination of disability. Under the controlling principles of law, as we explain below, that fact is dispositive.

III. APPLICABLE LEGAL STANDARDS

When the Administration has determined that a claimant's disability has ceased, the burden of proof to establish otherwise lies with the claimant. *Gonzalez v. Harris*, 631 F.2d 143, 145 (9th Cir. 1980). Furthermore, the burden "is a continuing one. It does not cease or shift after an initial ruling of disability has been had." *Id.* In an appropriate case, however, a prior ruling of disability can give rise to a presumption that the disability still exists. "Once evidence has been presented which supports a finding that a given condition exists, it is presumed in the absence of proof to the contrary that the condition has remained unchanged." *Rivas v. Weinberger*, 475 F.2d 255, 258 (5th Cir. 1973). A presumption, of course, does not affect the ultimate burden of proof. It does, however, impose "on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption."

Fed. R. Evid. 301.

The Secretary's own regulations provide that the decision of an ALJ on a disability question becomes binding "on all parties to the hearing" if none of the specified avenues of review are exercised by the claimant or the Secretary. 20 C.F.R. § 416.1455 (1981). In the present case, neither

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sidering the claimant's prior lumbar laminectomy. In any event neither electrodiagnostic study was positive for the existence of any neuropathology. X-rays of the lumbosacral spine taken on April 25, 1979 were interpreted by a radiologist as showing evidence of a partial laminectomy on the right at the L5 level. There was said to be a very slight disc space narrowing at the L4-5 level otherwise the stature, alignment, and disc spaces were unremarkable. No significant degenerative hypertrophic changes were apparently found by the radiologist. Flexion and extension views demonstrated appropriate motion at all levels within normal limits. The impression was mild degenerative and post-surgical changes as previously noted.

the Secretary nor the claimant saw fit to disturb the 1978 determination by an ALJ that the claimant was disabled at that time. The question before us now, therefore, is whether that determination gave rise to a presumption at the time of the 1979 hearing that the claimant was still disabled—a presumption which the Secretary was required to "meet or rebut" with evidence that her condition had improved in the interim. We answer that question in the affirmative. We are unable to discern any reason why the familiar principle that a condition, once proved to exist, is presumed to continue to exist, should not be applied when disability benefits are at stake. The Fifth Circuit has expressly approved such application. *Rivas v. Weinberger*, *supra*. *Accord*, *Prevette v. Richardson*, 316 F. Supp. 144, 146 (D.S.C. 1970). In *Prevette*, the district court reversed the Secretary's determination denying disability benefits where there had been a prior determination of disability, and where neither of the two subsequent medical reports indicated recovery by the claimant. The case before us is almost identical.

As we have said, when a claimant is entitled to the benefit of a presumption that her disability still exists, the burden is still on her to prove her case. All the presumption does is impose on the Secretary a burden to come forward with evidence that her condition has changed. Whether that burden has been met is a judgment to be made initially by the Secretary, and that judgment cannot be overturned on appeal if it meets the "substantial evidence" standard. *See, e.g.*, *Gonzalez v. Harris*, *supra*, 631 F.2d at 145. But where, as here, there is essentially no evidence to support a conclusion that the claimant's condition has changed, the substantial evidence standard has not been met. Accordingly, we REVERSE.

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

RECEIVED
AUG 6 1979
OHA

: All RCALJs
All ALJICs
All ALJs

DATE: [illegible] JUL 1979

REFER TO: SG--1

OM : Acting Associate Commissioner
for Hearings and Appeals

JECT: Resolution of Issues Raised in Bono Lawsuit -- INFORMATION

On June 7, 1979, a settlement was reached in the civil suit of Charles N. Bono, et al., vs. United States of America, Social Security Administration, et al.. This settlement brings to what I consider a fruitful and satisfactory conclusion a prolonged period of constructive introspection within OHA. The purpose of this memorandum is to summarize the provisions of the settlement and to discuss the practical effects which these provisions will have on the Office of Hearings and Appeals.

Under the terms of the settlement, it is recognized "that the management of the Social Security Administration and its Office of Hearings and Appeals (OHA) has the authority to exercise administrative and management functions over its corps of administrative law judges (ALJs)."

Consistent with this recognition, it is further understood by the parties to the settlement that the "Office of the Associate Commissioner of OHA may maintain records on individual ALJs' total dispositions and reversal rates for OHA's internal management purposes." While these records may continue to be maintained for OHA's internal management purposes, the figures on individual ALJs will not be published, and they will not be disseminated, "except to those persons to whom the law grants the right to know."

While it is apparent from the increasing requests for hearing received in recent months that OHA must maintain a high ALJ performance level if the Office is to respond properly to its rising workloads, it is understood that OHA will not issue directives or memoranda which set any specific number of dispositions by ALJs as quotas or goals. These prohibitions apply to both the headquarters staff and to management officials in the regional and hearing offices as well.

FILED
JAN 10 1980
JAMES F. DAVEY, Clerk

[TAB H]

One consequence of the settlement has been a reexamination of the OHA travel policy, as well as the transfer and training policies, and their revision to delete mention of any minimum number of cases which must be set to justify hearing trips, and to delete production figures as criteria for ALJ transfers and training. (See Tabs A and B attached hereto.)

Another consequence of the settlement is that, effective immediately, all new requests for hearing must be assigned to ALJs in the hearing office on a true rotational basis, as soon as they are received in the hearing office, to the extent that this is practicable. In determining practicability, the ALJIC may properly consider, among other factors, the extent to which any ALJ has an extensive backlog of pending cases. When cases in the hearing office are assigned on a geographic basis, the geographic areas must be rotated equitably among all the ALJs in the office. Further, when a case is remanded to the hearing office by the Appeals Council or the courts, it is the ALJIC's responsibility to insure that the case will not be reassigned to the ALJ to whom it was originally assigned, unless the Appeals Council or Court order so specifies. Rather, such cases will be assigned to other ALJs in that hearing office on a true rotational basis, to the extent practicable. (See Tab A.)

As part of the settlement, I have attached for your information a memorandum which describes the operation of the Quality Assurance Program, including the Quality Review System (Tab C). The final portion of that memorandum, entitled "Regional Chiefs' Review System," clarifies the current status of what was once described as "Regional Peer Review." Also attached is a memorandum on the Hearing Office Manager Program (Tab D).

I believe that one of the signal accomplishments of OHA over the past four years has been the expanded and professionally enhanced position which the administrative law judge now holds in the Social Security Administration. Yours is a position which has been carefully and thoughtfully developed -- not without some difficult and unsettled times -- through hard work, dedication and cooperative effort on the part of OHA management and OHA judges alike. It is my belief that the common interests of OHA management and OHA judges which converged in the settlement of this suit signify a reaffirmation of this cooperative spirit.

Lastly, I want to note that I normally would have consulted with the RCALJs, the Policy Council, and the ALJ Association prior to implementing some of the measures associated with the settlement. However, because of the experience and background surrounding the development of the policies announced herein, I concluded that consultation would not serve its usual purpose. After careful deliberation, it has become clear to me that resolution of subject lawsuit and implementation of these policies and procedures are in the overall best interest of OHA. However, please be assured that in the event consideration is given to modifying any of the positions expressed herein, such proposed changes will be submitted to the Policy Council, ALJ Association, and the entire corps for suggestions and comments prior to my making any final decisions.

Donald A. Gonya

* Attachments
Tab A - Memorandum, subject, "Assignment of Cases -- New Policy"
Tab B - Memorandum, subject, "Modification of Policies Relating to ALJ Transfers and Training -- INFORMATION"
Tab C - Memorandum, subject, "OHA's Quality Assurance Program -- INFORMATION"
Tab D - Memorandum, subject, "GS-13 Hearing Office Manager Position -- INFORMATION"

*Subcommittee note: Attachments not included.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CHARLES N. BONO, et al.,)
)
Plaintiffs,)
)
vs.) Civil No. 77-0819-CV-W-4
)
UNITED STATES OF AMERICA)
SOCIAL SECURITY ADMINISTRATION)
et al.,)
)
Defendants.)

SETTLEMENT AGREEMENT

In order to settle the lawsuit of Bono, et al. v. United States of America Social Security Administration, et al., U.S.D.C. W.D.Mo., No. 77-0819-CV-W-4, the following agreement is hereby entered into by the parties:

1. The parties agree that the management of the Social Security Administration and its Office of Hearings and Appeals (OHA) has the authority to exercise administrative and management functions over its corps of administrative law judges (ALJs).

2. The Office of Associate Commissioner of OHA may maintain records on individual ALJs total dispositions and reversal rates for OHA's internal management purposes. Those figures will not be published, nor disseminated except to those persons to whom the law grants the right to know.

3. OHA will not issue directives or memoranda setting any specific number of dispositions by ALJs as quotas or goals.

4. OHA shall issue a directive to all ALJICs calling for the assignment to an ALJ of requests for hearings as soon as they are received in the Hearing Office on a true rotational basis, to the extent practicable. In determining practicability, the ALJIC may properly consider, among other things, the extent to which any ALJ has an extensive backlog of pending cases. Cases may be assigned on a geographical basis only if the geographic areas are rotated among the ALJs on an equitable basis. OHA will also issue a directive that a case remanded by the Appeals Council or the courts

will not (unless the court or Appeals Council specifically directs otherwise) be reassigned to the ALJ to whom it was originally assigned, but such cases will be assigned to other ALJs in that Hearing Office on a true rotational basis to the extent practicable.

5. OHA shall amend its travel policy, presently set forth in SSA, ADS Guide OHA.f:240-54 (dated 4/30/79), to omit mention of any minimum number of cases which must be set to justify travel for hearing trips in Sections II.B.1 and II.C.4 of that policy.

6. OHA will revise its transfer and training policies to eliminate any specific mention of production figures as criteria.

7. OHA shall prepare a memorandum describing the operation of the Quality Assurance Program, including the Quality Review System carried on by the Appraisal Staff of OHA, which memorandum will be distributed to all ALJs.

8. OHA shall issue a memorandum clarifying the status of "Regional Peer Review" and the Hearing Office Manager Program.

9. OHA reserves the right to modify or change the policies agreed to above. No future amendments or changes in these policies, however, will be made by OHA management without prior good faith consultation with the ALJ Policy Council, the Association of ALJs in HEW, and the ALJ corps.

10. Upon performance by defendants of the agreements set forth in paragraphs 4, 5, 6, 7 and 8 hereof, a statement of dismissal with prejudice at defendants' cost will be filed herein by plaintiffs, incorporating by reference this settlement agreement, a copy of which shall be attached thereto.

Charles N. Bono
Charles N. Bono, Plaintiff
19 East 114th Terrace
Kansas City, Missouri 64114

6-19-79
Dated

William W. Cochrane
William W. Cochrane, Plaintiff
9723 Ensley Lane
Leawood, Kansas 66206

6-19-79
Dated

[illegible] 06-15-82
[illegible] A FULL TRUE AND
[illegible] IN MY OFFICE

Richard L. Jandt
Richard L. Jandt, Plaintiff
8431 Cedar Street
Shawnee Mission, Kansas 66207

6/19/79
Dated

Hammond C. Woods — 6/14/79

Hammond C. Woods, Plaintiff — Dated
11 East Winthrope Road
Kansas City, Missouri 64113

6/12/79

Donald A. Gonya — Dated
Acting Associate Commissioner
Office of Hearings and Appeals
Social Security Administration

For Defendants

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ATTORNEY FOR PLAINTIFFS

Paul Gaukler — 6-14-79

Paul A. Gaukler — Dated
Attorney, Department of Justice
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Washington, D.C. 20530
(202) 631-3492

ATTORNEY FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF ADMINISTRATIVE LAW
JUDGES, INC.,
Plaintiff,

Civil Action No. 83-0124

v.

MARGARET M. HECKLER, *et al.*,[1]
Defendants.

FILED
MAR 2[illegible]
JAMES F. DAVEY, Clerk

HHS DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Defendants Heckler, Svahn, Hays, and Brown, by their undersigned attorneys, hereby submit their Statement of Material Facts As To Which There Is No Genuine Issue, pursuant to Local Rule 1-9(h) and this Court's order of March 14, 1983.[2]

1/ Margaret M. Heckler has succeeded Richard S. Schweiker as Secretary of Health and Human Services, and is automatically substituted as defendant in her official capacity pursuant to Rule 25(d), Federal Rules of Civil Procedure.

2/ While some of the documents cited in support of this statement have previously been filed, for the convenience of the Court we are filing additional copies herewith. The following citation forms are used in this statement:

Citation Form	Attachment
Bellmon Report	A
Hays Memorandum (originally filed by plaintiff as an attachment to Bono affidavit)	B
Hays Declaration (1/24/83)	C
Supplemental Hays Declaration (1/27/83)	D
Second Supplemental Hays Declaration (3/24/83)	E
Bellmon Review Feedback Reports ##1-7	(exhibits to) E

I. THE OFFICE OF HEARINGS AND APPEALS

1. The Office of Hearings and Appeals (OHA) of the Social Security Administration (SSA), Department of Health and Human Services (DHHS) provides individuals with de novo hearings and, when appropriate, appellate review of decisions on those hearings, on claims filed under Title II, Title XVI, and Part A, Title XVIII of the Social Security Act. Hays Declaration ¶ 2.

2. OHA employs approximately eight hundred administrative law judges (ALJs) to hear and decide cases. Id. ¶ 6.

3. The Appeals Council, a component of OHA, has authority to review all ALJ decisions. Hays Declaration ¶ 10; 20 C.F.R. §§ 404.967, 416.1467.

4. The Office of Hearings and Appeals is headed by the defendant Associate Commissioner for the Office of Hearings and Appeals. Hays Declaration ¶ 1.

5. Neither the Associate Commissioner nor any other official of OHA with supervisory authority over ALJs is engaged in the performance of investigative or adversary functions for the agency. Second Supplemental Hays Declaration ¶ 7.

II. COMPILATION OF "ALLOWANCE RATES"

6. The Office of Hearings and Appeals records individual ALJ allowance rates, i.e., the percentage of cases in which claims are allowed by each ALJ. Hays Declaration ¶ 9.

7. Allowance rates are recorded for individual ALJs to assist management officials in identifying problems or potential problems in the adjudicative process. Hays Declaration ¶ 9.

III. REVIEW OF ALJ DECISIONS

8. The Appeals Council has the authority to review all ALJ decisions. Any claimant may request Appeals Council review of an ALJ decision that is less than fully favorable. 20 C.F.R. §§ 404.967, 416.1467. Further, the Appeals Council has the authority to review any ALJ decision acting on its own motion. In either case, claimant request for review or own-motion review, the criteria the Appeals Council applies in determining whether to take jurisdiction of the case are the same: (1) there appears to be an abuse of discretion by the ALJ, (2) there is an error of law, (3) the hearing decision is not supported by substantial evidence, or (4) there is a broad policy or procedural issue involved. 20 C.F.R. §§ 404.970, 416.1470. When it takes jurisdiction of a case, the Council may issue a decision that affirms, modifies or reverses the hearing decision; or, where the Appeals Council determines additional evidence is required, it will generally remand the case for further proceedings and a new decision. Hays Declaration ¶ 10.

9. In fiscal year (FY) 1982, the Appeals Council reviewed approximately 76,000 cases, of which approximately 64,000 were initiated by claimant requests for review of adverse ALJ decisions and about 12,000 were examined under the "Bellmon review" utilizing the Appeals Council's own-motion authority. Thus Bellmon cases represented less than 20 percent of the Appeals Council caseload in FY 82. Hays Declaration ¶ 13.

10. The findings of a comprehensive study conducted by SSA and submitted to Congress indicated that the Appeals Council more often finds ground for reversal of decisions by ALJs with unusually high allowance rates than with the decisions of ALJs with average or below-average allowance rates. The actual results of the own-motion review also show a clear correlation between high allowance rates and a high number of erroneous decisions as determined by the Appeals Council on review. Hays Declaration ¶¶ 15; Bellmon Report at 23; Hays Memorandum at 3.

11. The results of Appeals Council actions indicate that, on average, ALJ denial decisions are less often defective than ALJ allowance decisions. Hays Declaration ¶ 18.

12. The Appeals Council currently reviews approximately 15 percent of title II and concurrent title II-title XVI ALJ allowance decisions under the Bellmon own-motion review program. There are four categories of cases in the review. There is a national random sample of all ALJ allowance decisions. This constitutes approximately 25 percent of the cases reviewed. The allowance decisions of new ALJs are reviewed. Decisions that the Office of Disability Operations (the SSA component responsible for implementing ALJ allowance decisions) believes to be in error are also reviewed. These two categories together constitute almost 25 percent of the cases reviewed. Finally, there is a category of individual ALJs, initially selected for review either (1) because their allowance rates prior to going under review were 70 percent or higher (the national average allowance rate for all ALJs in

fiscal year 1982 was 52.7 percent); or (2) because the own-motion rate[3] of the ALJ's decisions reviewed under the random sample component of review significantly exceeded the national average. This "individual ALJ category" represents approximately 50 percent of the cases reviewed. Hays Declaration ¶ 14; Second Supplemental Hays Declaration ¶ 2; Hays Memorandum at 2.

13. With respect to the category of individual ALJs, there are four review levels -- those ALJs on 100 percent review, 75 percent review, 50 percent review, and 25 percent review. ALJs with the highest own-motion rates are subject to 100 percent review, those with the lowest own-motion rates are under 25 percent review, and those in between are either under 50 percent or 75 percent review. If an ALJ maintains a consistently low own-motion rate (approximately 5 percent), he or she will be dropped from own-motion review entirely, regardless of his or her rate of issuing allowance decisions. Recently 24 ALJs previously under individual ALJ Bellmon review have been dropped from review because of consistently low own-motion rates. Hays Declaration ¶ 16; Supplemental Hays Declaration ¶ 2; Second Supplemental Hays Declaration ¶ 2; Hays Memorandum at 2-3.

IV. FEEDBACK AND COUNSELING

14. Information learned from Appeals Council review has been used to develop the continuing education now being given to all

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[3] "Own-motion rate" is the percentage of the ALJ's reviewed decisions over which the Appeals Council takes jurisdiction and either reverses or remands.

ALJs, and aids in identifying areas where policy clarification is needed. Hays Declaration ¶ 17.

15. OHA has established a system of counseling to disseminate individualized analytical reports dealing with the ALJs. The purpose of the feedback system is to advise ALJs of decisional weaknesses and to provide a mechanism for achieving long-term improvement. Hays Declaration ¶ 17; Hays Memorandum at 4.

16. This feedback system will point out the errors that caused the Appeals Council to reverse or remand an ALJ's decisions, and will neither direct the ALJ to make fewer allowance decisions, nor direct the outcome of specific cases. Hays Declaration ¶ 17; see Bellmon Review Feedback Reports ## 1-7.

17. The feedback system will point out errors in denial as well as allowance decisions. Bellmon Feedback Review Report No. 1 at 2.

18. This feedback system will initially apply to ALJs selected for 100 percent Bellmon review; however, it will be used to assist any ALJ who is found to have a high own-motion rate. Hays Declaration ¶ 17.

19. No counseling sessions under the feedback program have been conducted to date. Hays Declaration ¶ 3.

20. OHA has decided to initiate a review to determine if there are ALJs with high error rates on denial decisions. When OHA obtains information about individual ALJ error rates in denial decisions, it will institute an appropriate program of counseling and training for any ALJs with high error rates. Hays Declaration ¶ 18.

21. It is OHA policy that agency employees (except employees working under the direction of the ALJ) are not to communicate off the record with any ALJ concerning any fact in issue in pending proceedings. Second Supplemental Hays Declaration ¶ 7.

V. PERFORMANCE RATINGS AND ADVERSE ACTIONS

22. ALJs employed by OHA do not receive performance ratings, and they are excluded from all performance appraisal systems. Hays Declaration ¶ 12; Second Supplemental Hays Declaration ¶ 7.

23. ALJs newly employed by OHA are not required to complete a one-year period of probation. Second Supplemental Hays Declaration ¶ 7.

24. ALJs employed by OHA do not receive honorary or monetary awards based on performance. Id.

25. Payment of periodic step increases to ALJs employed by OHA is not dependent on performance. Id.

26. OHA has never proposed that any adverse action be taken against an ALJ based on the ALJ's percentage of allowance decisions, and has no intention of initiating any adverse action on such grounds. Hays Declaration ¶ 4; Second Supplemental Hays Declaration ¶ 5.

27. OHA has never proposed that any adverse action be taken against an ALJ based on an ALJ's failure to maintain an acceptable level of decisional correctness and has no present plans to propose such an adverse action. The agency has not ruled out the possibility that such an action may be necessary in the future in an extreme case where, despite repeated Appeals Council own-motion actions, counseling, feedback, and other assistance, an ALJ

repeatedly misapplies the law, regulations, and Social Security Rulings. Hays Declaration ¶ 5; Second Supplemental Hays Declaration ¶ 6.

VI. AGENCY POLICY

28. It is not the policy of OHA to reduce allowance rates of ALJs. It is, however, the policy of OHA to reduce inconsistency in the application of law and regulations both within the ALJ corps and between the different levels of the adjudicatory process. One purpose of Appeals Council Review of ALJ decisions, whether initiated by claimants or the Appeals Council's own motion, is to reduce such inconsistency. Other agency initiatives, such as improvements in the training of new ALJs, continuing education for veteran ALJs, and the issuance of a single set of adjudicatory guidelines, also are designed to raise the level of consistency. Second Supplemental Hays Declaration ¶ 3.

Respectfully submitted,

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RICHARD K. WILLARD
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Mary E. Goetten
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E.L.R.
JUN 20 1983

FILED
JUN 16 1983
JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF ADMINISTRATIVE)
LAW JUDGES, INC.,)
)
Plaintiff,)
)
v.) Civil Action No. 83-0124
)
MARGARET M. HECKLER, et al.,)
)
Defendants.)

ORDER

Upon consideration of defendants' motion for summary judgment, plaintiff's opposition thereto, the supporting documentation of the parties, oral arguments and the entire record herein, it is determined that the following disputed material facts, which may not constitute the entirety of disputed material facts, preclude summary judgment under Fed. R. Civ. P. 56(c).

> 1. Whether defendants' practices subject plaintiff's members to unlawful performance ratings?

Compare HHS Defendants' statement of material facts as to which there is no genuine issue at Part V; Declaration of Louis B. Hays at ¶ 12; Defendants' motion to dismiss at 35-36 with Plaintiff's statement of genuine issues ¶ 6; Plaintiff's opposition to defendants' motion to dismiss at 43-44; affidavit of Charles N. Bono, Plaintiff's Exh. 14 at ¶¶ 20, 22;

> 2. Whether Defendants' Bellmon Review program which initially concentrates on high allowance ALJs, or any other of defendants' acts or practices including the proposed "feedback" sessions, "pressure," intimidate or encourage

> plaintiff's members to decide fewer cases in favor of social security claimants, thereby compromising any decisional independence ALJs enjoy under the APA and applicable regulations?

Compare HHS defendants' statement of material facts as to which there is no genuine issue at ¶ 16; Attachment A to HHS Defendants' statement of material facts as to which there is no genuine issue, "Bellmon Report" at 23; Declaration of Louis B. Hays at ¶¶ 12, 16, 17; Second Supplemental Declaration of Louis B. Hays at ¶¶ 3, 5; Defendants' motion to dismiss at 41, 44-45 *with* Plaintiff's statement of genuine issues at ¶ 1; Affidavits of Jerry Thomasson, Plaintiff's Exh. 2 at ¶ 5, and Francis Mayhue, Plaintiff's Exh. 3 at ¶ 3 (defendants have indicated that an acceptable allowance rate is 45-55%); Affidavits of Jerry Thomasson, Plaintiff's Exh. 8, and Francis Mayhue, Plaintiff's Exh. 7 (punitive travel imposed for high allowance rate); Plaintiff's Exh. 6 (low allowance rate rewarded by nomination to National College of the State Judiciary); Affidavit of Ainsworth H. Brown, Plaintiff's Exh. 4 at ¶¶ 14-15 (ALJs in counselling sessions would be directed to alter substantially their conduct of hearings which would affect ultimate conclusions; Affidavit of David T. Hubbard, Plaintiff's Exh. 13 at ¶ 7 (counselling sessions designed to harass and encourage denials of claims); Affidavit of Charles N. Bono, Plaintiff's Exh. 14 at ¶ 18 (program of decisional review creates incentive to deny claims irrespective of their merits); Plaintiff's opposition to defendants' motion to dismiss at 13.

Therefore, it is, by the Court, this 16th day of June, 1983

ORDERED, that defendants' motion for summary judgment shall be, and the same hereby is, denied; and it is

FURTHER ORDERED, that counsel for the parties shall appear for a pretrial conference in Chambers on July 27, 1983, at 4:30 p.m. having complied with the attached pretrial Order and that the trial of this action shall take place on September 27, 1983, at 10:00 a.m. in Courtroom 18 unless counsel advise immediately that he will be otherwise engaged in trial on either of those dates.

JOYCE HENS GREEN
United States District Judge

FILED

JUN 16 1983

JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF ADMINISTRATIVE)
LAW JUDGES, INC.,)
)
Plaintiff,)
)
v.) Civil Action No. 83-0124
)
MARGARET M. HECKLER, et al.,)
)
Defendant.)

ORDER

Upon consideration of the trial scheduled for September 27, 1983, at 10:00 a.m., it is this date

ORDERED that counsel for each of the parties comply with the following requirements for the pretrial conference scheduled at 4:30 p.m. on July 27, 1983 in Chambers.

1. Trial counsel must be present at the pretrial conference.

2. The parties shall submit to Chambers an original and one copy of the pretrial brief no later than seven days prior to the scheduled conference. Pretrial briefs shall have been exchanged between counsel at least fourteen days prior to the conference. The pretrial briefs, exhibits, and proposed findings of fact and conclusions of law, are not to be filed with the Clerk's Office.

3. The pretrial briefs shall contain:

a. A concise statement of the essential facts proposed to be proven, unless already set forth in the proposed findings of fact for non-jury trials, in which case the latter shall be sufficient.

b. A joint statement of material facts no longer in dispute and a joint statement of issues about which there is a genuine controversy.

c. Two copies of all exhibits to be offered in evidence at trial. Plaintiff's exhibits are to be identified and indexed numerically; defendant's exhibits are to be identified and indexed alphabetically.

d. Two lists of exhibits, with a brief description of each item the party intends to offer into evidence, including notations as to any stipulations reached and any objections the opposing party intends to raise.

e. A list of the witnesses each party intends to call at trial.

f. A statement of the legal contentions necessary to establish the party's claim or defense, separately stated and supported by citation to legal authorities.

g. Itemization of all special damages claimed.

h. If the case is to be tried to a jury, counsel for each of the parties shall present at the pretrial conference any proposed jury instructions for non-routine elements of this case, with authorities noted. Objections, if any, are to be noted on the opposed jury instruction.

i. In all nonjury cases, each counsel shall submit the original and one copy of the proposed findings of fact and conclusions of law, having served them on opposing counsel at least seven days earlier. If appropriate, findings of fact and conclusions of law may be supplemented at conclusion of the trial in accordance with the proof adduced.

Any legal contention, claim for relief or defense (in whole or in part), or affirmative matter not set forth as provided above shall be deemed abandoned, uncontroverted, or withdrawn (as may be appropriate), notwithstanding the contents of any pleadings or other papers filed in the case, except for matters of which a party could not have been aware in the exercise of reasonable diligence at the time the pretrial brief was submitted.

Failure to comply with any of these requirements may result in dismissal or default.

JOYCE HENS GREEN
United States District Judge

Date: June 16, 1983

TO: ALJICs, ALJs, HOAs, HOMs

R/O Numbered Memorandum

R/O # 81:12-23

Subject Listing of FY 82 OHA Initiatives and Objectives

File Code AM-14

Date December 21, 1981

RECEIVED
[illegible] 1981
OHA SAN RAFAEL

December 3, 1
SG-F9
81;12-23
AM-14

LISTING OF FY 82 OHA INITIATIVES AND OBJECTIVES

Initiative I - Managing OHA Caseload

1. Attain and maintain an 800 ALJ corps.

   Lead : OCALJ
   Support: OFPA/OFA

2. Devise and implement ALJ orientation program for all new FY 82 apointments.

   Lead : DAC(P)/Training Initiatives Staff
   Support: OFA/OFPA/RCALJs

3. Attain and maintain a national average of 5:1 support staff: ALJ ratio.

   Lead : OFA
   Support: RCALJs

4. Achieve a disposition rate of 40 per month per judge by September 1982; 45 per month per judge by September 1983.

   Lead : OFA
   Support: RCALJs/RMOs

5. Set up minimum of one remote word processing center in FY 82.

   Lead : OMC
   Support: OFA

6. Implement hearing office reconfiguration in 30 hearing offices in FY 82.

   Lead : OFA
   Support: RCALJs/OFPA

7. Upgrade word processing equipment in FY 82 -- Hearing Office Automation.

   Lead: OMC

8. Ascertain equipment needs and upgrade as required; e.g. dictating/recording equipment, and photocopying machines.

   Lead : OMC/OFPA
   Support: OFA

9. Increase use of remands back to State agencies.

    Lead: OPP

10. Reduce the problem of claimants failing to attend scheduled hearings (increase the use of dismissals/decrease the use of continuances).

    Lead: OPP

will need to involve
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11. Initiate procedures to curtail SSA involvement in attorney fee process. Implement final regulations by end of FY 82.

    Lead: OPP

12. Establish new and/or modify existing newsletter to serve as monthly vehicle for innovations relating to the field. Examine organizational placement; i.e., OFA rather than OFPA.

    Lead: OFPA
    Support: OFA

Initiative II - Improving Decisional Quality and Consistency

1. Attain 15% review rate under Bellmon by end of FY 82.

   Lead: OA/OAO

2. Resolve differences between OHA's and SSA's interpretation of laws and regulations.

   A. Identify differences

   B. Clarify reasons for differences

   C. Eliminate differences

   Lead : DAC(P)
   Support: OPP

3. Convert POMS Material into OHA Handbook.

   Lead: OPP

4. Proceed with rulemaking to require that the Handbook be binding to ALJs.

   Lead: OPP

5. Develop and initiate improved quality review system. Utilize Bellmon and claimant initiated review procedures to identify specific deficiencies.

   Lead : OA
   Support: OAO/Appeals Council

6. Phase in elimination of short form decision.

   Lead : OPP
   Support: OFA

7. Implement GRE in four hearing offices by January 1982.

   A. Issue necessary regulations regarding implementation of experiment.

   Lead: OPP

   B. Plan and implement GRE.

   Lead : OFA
   Support: OPP/OFPA

   C. Evaluation of results sufficiently early for inclusion in FY 84 budget.

   Lead : OFA
   Support: OA/OHC

Initiative III — Enhance Image and Credibility of OHA

1. Monitor ALJs and initiate appropriate adverse actions against underachieving ALJs.

   Lead : OSC/OFA
   Support: OFPA

2. Establish procedures to initiate adverse actions against ALJs who abuse time and attendance and/or whose conduct brings discredit to the Office and position.

   Lead : OSC/OFA
   Support: OFPA

3. Increase capabilities to pursue charges of impropriety in field and C.O. Explore establishment of Office of Investigation.

   Lead : OSC
   Support: OFPA/OA/OFA

Initiative IV - Improving Agency Performance Through Training Tailored to Current Needs

1. Provide continuing education for ALJs during FY 82 (program, employee/supervisor relations, E.E.O. and sexual harrassment). If necessary, expand training staff.

   Lead : DAC(P)/Training Initiatives Staff
   Support: OFPA/EOS/OFA

2. Develop FY 82 management training for ALJICs and hearing office administrators.

   Lead : DAC(P)/Training Initiatives Staff
   Support: OFPA/EOS/OFA

3. Develop FY 82 training for new and existing hearing office support staff.

   Lead : DAC(P)/Training Initiatives Staff
   Support: OFA/OFPA

4. Clarify role and responsibility of RCALJs to ensure accountability for quality, credibility, and productivity.

   Lead : OFA/OAC
   Support: OFPA

5. All items to be included in FY 82 Merit Pay Plans.

   Lead : OFPA/OFA
   Support: OHA Managers